80-1874

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGIA PATSY,

Petitioner,

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES S. SIMS
(Counsel of Record)
BRUCE J. ENNIS, JR.
E. RICHARD LARSON
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Counsel for Petitioner

Georgia Patsy respecfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

QUESTIONS PRESENTED

1. Whether the Fifth Circuit's requirement that all §1983 plaintiffs exhaust state administrative remedies conflicts with the repeatedly reaffirmed holding by this Court that exhaustion of administrative remedies in §1983 cases may not be required.

2. Whether the Fifth Circuit's requirement that all §1983 plaintiffs exhaust state administrative remedies is inconsistent with the intent of Congress, especially the recent enactment of a carefully tailored, limited exhaustion requirement in section 7 of the Civil Rights of Institutionalized Persons Act,

P.L. 96-247, 42 U.S.C. §1997e.

3. Whether the Fifth Circuit erred in requiring plaintiff in a §1983 action seeking injunctive relief or damages to exhaust state administrative remedies where the defendant failed to demonstrate that such remedies would be plain, speedy, and effective, and where the agency to which plaintiff would ultimately be remanded at the end of the administrative process is not empowered to grant injunctive relief, or to grant the damages alternatively sought by plaintiff.

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OPINIONS BELOW

The opinion of the Court of Appeals en banc (App. A at 1a-122a) is reported at 634 F.2d 900. The vacated opinion of the Fifth Circuit panel (App. B at 123a-126a) is reported at 612 F.2d 946. The summary order of the District Court dismissing the complaint for failure to exhaust administrative remedies (App. C at 127a-128a) is not reported.

JURISDICTION

The judgment of the en banc Court of Appeals (App. D at 129a-131a) was entered on January 22, 1981. On April 3, 1981, Justice Powell extended the time for filing a petition for a writ of certiorari to and including May 7, 1981. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1997e is set forth infra, App. E at 132a.

STATEMENT OF THE CASE

1. Nearly two and one-half years ago, on February 7, 1979, Georgia Patsy filed a complaint in the United States District Court for the Southern District of Florida alleging that the defendant state university, her employer,

had unlawfully denied her employment opportunities for which she was well qualified, solely because of her race (caucasian) and sex. The allegations of the complaint were specific, noting, inter alia, that the defendant had maintained "files on qualified applicants for positions by segregating them as follows: White, Black, Male, and Female, contrary to federal law and equal employment guidelines." (R.41)[1/] Injunctive and/or monetary relief was sought pursuant to 42 U.S.C. §1983, and jurisdiction was properly founded on 28 U.S.C. §1343(3).

1/ "R.41" refers to numbers at the upper right corner of the pages of the Record Excerpts filed by Defendant-Appellee in the Court of Appeals.

Subsequent to service of an amended complaint, a motion to dismiss was filed on June 1, 1979 (R.61) and the District Court entered an Order on July 9, 1979, dismissing the complaint "for plaintiff's failure to allege exhaustion of administrative remedies". App. C at 127a.

2. Plaintiff's timely appeal to the Fifth Circuit was placed on the summary calendar pursuant to Fed. R. App. P. 34 and 5th Cir. Local Rule 18, and on February 28, 1980, Judge Godbold, for himself and Judges Reavely and Anderson, reversed and remanded for reinstatement of the complaint. App. B at 123a. The panel rested its conclusion that exhaustion was not required on what it considered to be the controlling decisions of Ellis v. Dyson, 421 U.S. 426 (1975), Steffel v. Thompson, 415 U.S.

452 (1974), and Gibson v. Berryhill, 411 U.S. 564 (1973).

3. The Fifth Circuit en banc granted the defendant's motion for rehearing, and nearly a year later, on January 22, 1981, reversed the panel by a vote of 17-7 and upheld the District Court's conclusion that plaintiffs in §1983 actions are required to exhaust administrative remedies. App A at 1a-120a.

Writing for the majority, Judge Roney dismissed as dicta each of this Court's repeated statements that §1983 plaintiffs are not required to exhaust. Because he believed the Fifth Circuit was free to consider the question anew, Judge Roney canvassed the policy reasons in favor of and against an exhaustion requirement, and concluded that exhaustion would henceforth be required in all §1983 cases under the general stan-

dards of such cases as McKart v. United States, 395 U.S. 185 (1969) and Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). 49a-50a. The panel only cursorily addressed the question whether the 42nd Congress intended to require exhaustion when it enacted what is now §1983 (38a-40a) and entirely ignored recent Congressional enactment of a limited and carefully tailored exhaustion requirement for a narrow category of §1983 cases, section 7 of the Civil Rights of Institutionalized Persons Act, P.L. 96-247, 94 Stat. 349, codified at 42 U.S.C. §1997e. The Court failed to inquire whether that enactment (of which it was apparently unaware) was inconsistent with judicial imposition of a different and far broader exhaustion requirement.

When it attempted to apply its new requirement to the facts before it, however, the Court found the record inadequate to determine "whether state administrative remedies were adequate in the context of the rights asserted by plaintiff." 55a. Accordingly, the case was remanded for such a determination, and for dismissal without prejudice if the District Court found that plaintiff had bypassed adequate remedies. Id.

Seven judges joined in three dissenting opinions. Judge Rubin, for himself and four other judges, agreed that some of this Court's no-exhaustion statements may have been dictum, but found Wilwording v. Swenson, 404 U.S. 249 (1971), an insuperable obstacle to the Fifth Circuit's exhaustion requirement. 57a-69a. Judge Rubin also distinguished the federal administrative

remedies relied on as a model by the majority from the myriad state procedures for which exhaustion would now be required, noting that "the Congress that enacted Section 1983 did not have the faith in state administrative remedies that later Congresses understandably had in the federal administrative remedies of their own creation." 65a-66a.

Judge Kravitch, in a brief dissent, agreed that only the Supreme Court could alter its long-established no-exhaustion rule. 69a. Judge Hatchett, for himself and four other judges, extensively canvassed both this Court's precedents and the policy considerations addressed by the majority. 70a-120a. Although he commended the state for creating an administrative remedy, Judge Hatchett found that §1983 left to plaintiffs the decision whether the state or federal

remedy would best enforce the rights at stake. Examining §1983 in the light of its legislative history, Judge Hatchett found that Congress had not intended to require exhaustion, because the state administrative bodies had no "expertise" to apply where federal issues were involved. 111a. He also emphasized the "time-consuming procedural nightmare" the majority opinion created, the inadequacy of the typical state administrative process in terms of awarding attorneys fees and maintaining class actions, and the special inadequacies of the procedure available to petitioner. 112a-115a.

REASONS FOR GRANTING THE WRIT

The exhaustion requirement imposed by the Fifth Circuit is directly contrary to repeated reaffirmations of the no-exhaustion rule by this Court, and conflicts with clear and recently

expressed congressional intent not to require exhaustion in §1983 cases such as this. It is also inconsistent with the holding in McNeese v. Board of Education, 373 U.S. 668 (1963), foreclosing exhaustion where the administrative officials before whom exhaustion must be had are not empowered to grant relief, but may (at most) repair to a state court for enforcement, even if they finally agree at the end of administrative proceedings that a grievant's rights have been violated. A writ of certiorari should be granted to review each of those conflicts.

Few cases present this Court with questions as obviously worthy of certiorari as this. Whether plaintiffs in §1983 actions may be required to exhaust administrative remedies, and if so, under what circumstances, is a question which has occupied the attention of this Court repeatedly since 1963. But as this case

makes clear, repeated assertions that courts may not require exhaustion have plainly not had the intended effect. At a minimum, certiorari is required to enforce obedience to law settled by this Court. Every member of this Court has indicated that the exhaustion question or §1983 cases has been long settled,[2] although some members of this Court have urged that it is ripe for this Court's reexamination.[3] The Fifth Circuit's imposition of an exhaustion requirement therefore raises an important question

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2/ See Burrell v. McCray, 42 U.S.471 (1976)(Stevens, J. concurring); Ellis v. Dyson, 421 U.S. 426, 432-433 (1975); Wilwording v. Swenson, 404 U.S. 249, 251 (1971); Carter v. Stanton, 405 U.S. 669 (1972); City of Columbus v. Leonard, 443 U.S. 905 (1979).

3/ See City of Columbus v. Leonard, supra. (Rehnquist and Blackmun, JJ, and Burger, C.J., dissenting from the denial of certiorari).

regarding the duty of the courts of appeals to follow the law as definitely set forth by this Court unless and until overruled. It raises as well as the substantive question of exhaustion itself which at least three members of this Court have suggested deserves reconsideration.[4/]

Apart from creating a square conflict with cases from this Court[5/] and from the

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4/ Id.

5/ Ellis v. Dyson, 421 U.S. 426, 432-33 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Allee v. Medrano, 416 U.S. 802, 814 (1974); Steffel v. Thompson, 415 U.S. 452, 472 (1974); Preiser v. Rodriguez, 411 U.S. 475, 492-93 n.10 (1973); Gibson v. Berryhill, 411 U.S. 564 (1973); Carter v. Stanton, 405 U.S. 669, 671 (1972); Wilwording v. Swenson, 404 U.S. 249, 251-52 (1971); Houghton v. Shafer, 392 U.S. 639, 640 (1968); King v. Smith, 392 U.S. 309, 312 N.4 (1968); Damico v. California, 389 U.S. 416, 417 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963).

other Courts of Appeals,[6] the decision below is also inconsistent with the will of Congress. This Court has long understood the history behind enactment of §1983 to reveal a policy preference for federal enforcement of federally guaranteed rights. Forced subjection of §1983 litigants to the time-consuming, often ineffective, and nearly always inadequate

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6/ See, e.g., Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973); Hochman v. Board of Education, 534 F.2d 1094 (3rd Cir. 1976); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), cert dismissed as improvidently granted, 426 U.S. 471 (1975); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Stradley v. Andersen, 456 F.2d 1063 (8th Cir. 1972); Canton v. Spokane School District, 498 F.2d 840 (9th Cir. 1974); Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975). The Seventh Circuit has required exhaustion only in certain prison §1983 cases, Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978) but that rule has been vacated by this Court and remanded for reconsideration in light of 42 U.S.C. §1997e. Jenkins v. Brewer, No. 80-5116, 49 U.S.L.W. 3616 (February 23, 1981). The Second Circuit requires plaintiffs to exhaust state administrative remedies. Eisen
(Footnote continued on next page)

procedures afforded by varying jurisdictions can only dissuade them, and their attorneys, from seeking the relief §1983 promised. The Court of Appeals' decision ignores the fact that Congress has pointedly failed to require exhaustion in the circumstances presented by this case, while explicitly requiring it in related but quite different contexts. Most importantly, the decision below is inconsistent with Section 7 of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997e, and renders that law superfluous. The adoption in §1997e, after extensive hear-

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(Footnote continued from preceding page) v. Eastman, 421 F.2d 560 (2nd Cir. 1969), "albeit with some hesitation," Plano v. Baker, 504 F.2d 595, 597 (2nd Cir. 1974), but the circumstances under which exhaustion may be required are notably more limited than in other areas of the law where exhaustion is required, or than will apparently be the case in the Fifth Circuit. See, e.g., Gonzales v. Shanker, 533 F.2d 832 (2nd Cir. 1976).

ings, of a carefully tailored exhaustion requirement for a limited category of §1983 cases demonstrates that Congress has not only been aware of and ratified this Court's longstanding and consistent interpretation of exhaustion under §1983, but has accepted its legislative responsibility to amend §1983 as changed conditions warrant. Judicial imposition of an exhaustion requirement for §1983 cases thus usurps "the policy role that Congress has reserved for itself." Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 269 (1975). The Court has recently vacated another Court of Appeals decision imposing an exhaustion requirement in certain §1983 cases, remanding for reconsideration in light of §1997e, Jenkins v. Brewer, No. 80-5116, 49 U.S. L.W. 3616 (February 23, 1981), and the judgment below should either be vacated

for similar reconsideration, or summarily reversed.

Finally, even without reaching the general question regarding exhaustion in §1983 cases which this case squarely presents, the Court should grant certiorari to resolve a conflict between this case and McNeese v. Board of Education, 373 U.S. 668 (1963). Although the McNeese court held that plaintiffs in §1983 suits were not subject to any exhaustion requirements, 373 U.S. at 671, it also observed that the state administrative remedy offered below was in any event inadequate, because the final administrative decision-maker was unable, even if he accepted plaintiff's arguments, to grant relief without repairing to a state court for enforcement. The procedure available here, notably more cumbersome and labyrinthine, suffers the same defect. Under

these circumstances, exhaustion may not be required, whatever the merits of exhaustion in other §1983 cases where state remedies provide substantially greater assurance of being plain, speedy, and effective.

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

This Court has repeatedly held, or stated without qualification, that exhaustion of state administrative remedies is not required in §1983 cases. See n.5 supra. Every member of this Court has agreed that the question has long been settled, see n.2 supra, although three Justices have urged that the question be reexamined, see n.3 supra. Under these circumstances, the decision below flagrantly violates the Court of Appeals'

obligation to obey this Court's decisions unless and until overruled. If for no other reason, certiorari should issue to summarily correct the Fifth Circuit's misapprehension of its responsibilities. Federal Communications Commission v. Broadcasting Service Organization, 337 U.S. 901 (1949); Securities and Exchange Commission v. Otis & Co., 338 U.S. 843 (1949).

Should more than three Justices now consider the no-exhaustion rule ripe for re-examination, see City of Columbus v. Leonard, supra, then the writ should issue both to correct the Fifth Circuit as a matter of procedures and to consider the merits of the exhaustion question itself.[7/] Compare West Virginia

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7/ If four Justices would not otherwise grant certiorari to consider the exhaustion rule, and City of Columbus v. Leonard, supra, suggests they would not, the Fifth
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Board of Education v. Barnette, 319 U.S. 624 (1943); Spector Motor Service v. McGlaughlin, 323 U.S. 101 (1944). Although petitioner urges such full consideration only in the event that the judgment below is not summarily reversed, and believes summary reversal appropriate because of this Court's precedents and the recent enactment of §1997e, full consideration upon briefs and oral argument would plainly be warranted in preference to the denial of certiorari. In light of the repeated reaffirmation of the no-exhaustion rule, even by its critics, City of Columbus v. Leonard, supra, a

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(Footnote continued from preceding page) Circuit's unwarranted departure from the rule hardly should provide the occasion for such full reexamination.

discretionary decision to let the judgment below stand would severely undermine the authority of this Court's decisions. Settled principles of stare decisis may not require slavish adherence to the no-exhaustion decisions, see Monell v. Department of Social Services, 436 U.S. 658 (1978),[8/] but they do not permit their

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8/ The reasons relied on in Monell to justify departure from stare decisis do not apply here. The McNeese no-exhaustion rule was not a departure from settled prior practice; it is not inconsistent with related expressions of congressional intent; petitioner and other §1983 plaintiffs have relied on the no-exhaustion rule in their expenditure of money and time to bring §1983 claims in federal courts; and it cannot be said here, as it was in Monell, that the rule is incorrect as a matter of statutory construction "beyond doubt". See 436 U.S. at 695-701.

casual discard through the failure to exercise the Court's discretionary jurisdiction.

The judgment below deprives petitioner of her repeatedly reaffirmed right to prompt federal consideration of ripe §1983 claims. The Fifth Circuit's decision to deprive petitioner of that right and to subject her to an extensive delay in addition to the two year delay she has already been compelled to accept, all in direct conflict with decisions of this Court and decisions of numerous Courts of Appeals, warrants this Court's review.[9/]

9/ This petition is not the occasion to address the merits of the exhaustion question. They are extensively addressed in the en banc decisions below, and in judicial and scholarly analysis. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 513-524 (Brennan, J., dissenting); Note, Exhaustion of State Administrative Remedies Under the Civil Rights Act, 8 Indiana Law

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II. THE DECISION BELOW IS INCONSISTENT WITH RECENT EXPRESSIONS OF CONGRESSIONAL INTENT.

For the reasons set forth by Judges Rubin and Hatchett in dissent, we think it clear that this Court's repeated holding that exhaustion is not required is correct, and accurately reflects the intention of the 42nd Congress. But even assuming arguendo that the intentions of the Congress that enacted what is now §1983 were open to varying interpretations so far as exhaustion of administrative remedies is concerned, subsequent history demonstrates uniformly and without contradiction that Congress is aware of, approves of, and has relied on the no-exhaustion rule in §1983 cases, while at the same time requiring exhaustion in a variety of other

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(Footnote continued from preceding page) Review 565 (1975); Comment, Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum.L.Rev. 1201 (1968); Comment, Exhaustion of State Remedies in Section 1983 Cases, 41 U.Chi.L.Rev. 537 (1974).

contexts.[10/] Moreover, Congress has recently addressed the issue, and has carefully decided to require exhaustion in §1983 cases only in extremely limited circumstances not present here. The Fifth Circuit's abrogation of the no-exhaustion rule and imposition of an across the board exhaustion requirement inconsistent with Congressional intention improperly usurped a policy judgment entrusted by the Constitution to Congress. Northwest Airlines v. Transport Workers Union, No. 79-1056, 49 U.S.L.W. 4303 (April 20, 1981); Illinois v. Milwaukee, 406 U.S. 91, 107 (1972); Arizona v. California, 373 U.S. 546, 565-566; Milwaukee v. Illinois, 49 U.S.L.W. 4445 (April 28, 1981).

10/ See, e.g., 28 U.S.C. §2254(b) - (c) (habeas corpus); 5 U.S.C. §704 (review of agency action); 28 U.S.C. §2401(b) (tort claims); 42 U.S.C. §2000e-5 (Title VII). See also App. A infra at 111a (Hatchett, J., dissenting).

Certiorari should issue to vacate that judgment, either by summary reversal or for reconsideration in light of the newly-enacted statute.

On May 23, 1980, Congress passed the Civil Rights of Institutionalized Persons Act, Pub. L. 96-247, 94 Stat. 349. Section 7 of the Act (codified at 42 U.S.C. §1997e) requires the Attorney General to adopt minimum standards "for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison or other correctional facility."[11/] Congress specifically required certain safeguards which the Attorney General's standards must include. States may apply to the Attorney General, out-

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11/ Section 7 is set out infra at 132a.

lining for him the procedures available to prisoners with grievances, and he is required to certify those procedures determined to be adequate. Once a state's procedures have been certified, if an adult prison inmate brings a §1983 action regarding a grievance related to his confinement, "the court shall, if the court believes that such a requirement would be appropriate and in the interest of justice, continue such a case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy and effective administrative remedies as are available." §1997e(a)(1). Dismissal for exhaustion is not permitted.

The judgment below is flatly inconsistent with §1997e, and certiorari should accordingly issue to reverse it or at least to remand for reconsideration in light of §1997e. Compare Jenkins v.

Brewer, supra. The decision below requires exhaustion in cases (such as this) where Congress declined to require it.[12/] It requires exhaustion through dismissal, without time limitation, and without the other strict limitations Congress imposed

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12/ A major theme in the legislative history was that prisoner §1983 cases posed special burdens on the district courts, because they were frequently poorly drafted and disproportionately frivolous. See, e.g., S.Rep. No. 96-416, 96th Cong., 2nd Sess., Senate Judiciary Committee (Nov. 15, 1979), at 34. Accordingly, the exhaustion requirement Congress enacted was limited to the problem it sought to remedy. There was no record before Congress indicating that §1983 cases by any other groups, including public employees claiming racial or sexual discrimination, posed any special burdens on federal courts, or required imposition of an exhaustion requirement.

on the carefully tailored exhaustion requirement of §1997e. Congress extended the carrot of exhaustion to induce the states to adopt a particular kind of administrative procedure, composed in part of Congressional requirements and in part of requirements formulated by the Attorney General "after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections." §1997e(b)(1).[13/] Here, in sharp contrast,

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13/ Representative Drinan, a co-sponsor of the bill and a member of the Judiciary Committee which considered it, noted in the final House debate that the grievance/exhaustion measure was "intended to serve the dual purpose of encouraging the establishment of grievance mechanisms in state correctional systems and of relieveing the federal courts of some of the burden of §1983 prisoner petitions." 125 Cong. Rec. H3637 (daily ed. May 23, 1979)

the judgment below requires exhaustion without any of the quid pro quo or inducements which Congress has attached to its limited exhaustion requirements. In light of the repeated statements by bill sponsors that the Act was less protective of the rights of prisoners than of the rights of other institutionalized persons covered by the Act[14/], it would be extraordinarily anomolous to require exhaustion in non-prisoner cases like this more broadly and with less compensating safeguards for civil rights litigants than in prisoner cases.

14/ See, e.g., 126 Cong. Rec. S.4622 (remarks of Senator Bayh); 125 Cong. Rec. H.3648 (daily ed. May 23, 1979) (remarks of Rep. Gudger); Id. at 1136-49 (daily ed. May 23, 1979)(remarks of Rep. Railsback).

The plain wording and meaning of section 7 makes clear Congress' understanding that even in prison cases exhaustion was not and could not be required prior to its enactment, and its decision to require exhaustion in the future only when and to the extent that the carefully balanced provisions so required. The legislative history confirms that understanding.

The Conference Report explained that the limited exhaustion requirement of continuance for ninety days applicable to certain §1983 cases brought by adult prisoners was "authorized" only in return for "substantial compliance with" the minimum grievance resolution procedures. H. Conf. Rep. No. 96-897, Civil Rights of Institutionalized Persons Act, 96th Cong., 2nd Sess. at 15. The Report stressed that §1983 cases only "unrelated to conditions of confinement...would not appropriately be continued." Id.

Statements by the bill's sponsors accurately reflected that understanding, as well. Rep. Drinan stated:

> Section 4 of H.R. 10 also authorizes a federal court in which an adult prisoner's suit filed under 42 U.S.C. 1983 is pending, to continue that action for a period not to exceed 90 days if the prisoner has access to a grievance resolution system which is in substantial compliance with the minimum standards promulgated under this legislation. Such limited continuance would be for the purpose of requiring exhaustion of the approved grievance resolution system.

125 Cong. Rec. H.3637 (daily ed. May 23, 1979).

Representative McClory ranking minority member of the Judiciary Committee, agreed that the Act was necessary to "allow courts to continue cases brought by state prisoners under 42 U.S.C. §1983" 125 Cong. Rec. H.3639 (daily ed. May 23,

1979) (emphasis added).[15] Plainly, Congress understood the law to be that

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15/ See also remarks of Rep. Butler, 125 Cong. Rec. H.3641 (daily ed. May 23, 1979) (section 7 "provides that in certain cases a federal judge may require a State prisoner, who has filed a 1983 petition, to go back and exhaust his state grievance procedure... Under existing law there is no requirement that a complainant first ask the state prison system to help him. He can file his grievance directly in the federal court and his case has to be investigated by that court..."); remarks of Rep. Sawyer, 125 Cong. Rec. H3643 (daily ed. May 23, 1979)("If a State opts to substantially adopt these grievance procedures, then before a prisoner may go into Federal court with a §1983 suit, he must go back and go through the grievance procedures to see if it cannot resolve the grievance without unnecessarily taking up the court's time..."); remarks of Rep. Gudger, 125 Cong. Rec. H3648 (daily ed. May 23, 1979) ("[T]here is a process here which has peculiar application to the prison problem... where there has been an inmate grievance procedure adopted (so that the grievances and protests of prison inmates may have a due process proceeding) there is a stay order available so that the civil action cannot proceed until that grievance proceeding has been exhausted. This has application only to the prison problem.") (Emphasis added).

unless the bill passed, lower courts would not have the power to order exhaustion of State administrative remedies in §1983 cases brought by prisoners, and that understanding is controlling here. As the Court has held, "'the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.'" Cannon v. University of Chicago, 441 U.S. 667, 711 (1979), quoting with approval from Brown v. General Services Administration, 425 U.S. 820, 828 (1976). See also New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70-71 & n.9 (1980).

Enactment of §1997e, and the themes repeatedly sounded without dissent in the debates preceding its passage, demonstrate that the Fifth Circuit's imposition of an exhaustion requirement is contrary to legislative intent. Compare NLRB v.

Sears Roebuck & Co., 421 U.S. 132, 164-165 (1975); Monell v. Department of Social Services, 436 U.S. at 696-99. The careful attention Congress has provided the problem, and the comprehensive character of the exhaustion scheme it has chosen, confirm an intent not to authorize additional or different procedural requirements. Northwest Airlines v. Transport Workers Union, 49 U.S.L.W. 4383, 4388 n.30 (April 20, 1981); National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974); cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524 (1978). Where Congress, informed of this Court's statutory interpretation decisions, fails to disturb them, and subsequently revises them only in narrowly limited circumstances, it is not the judiciary's province to render Congress' recent carefully considered

work superfluous, or unnecessary. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. at 260-271; Northwest Airlines v. Transport Workers Union, supra, 49 U.S.L.W. at 4387-88; Milwaukee v. Illinois, 49 U.S.L.W. at 4447-4449.

The recent disposition of Jenkins v. Brewer, vacating an exhaustion requirement for reconsideration in light of §1997e, accurately reflects these principles. The decision below is far more egregiously contrary to §1997e than was Jenkins. Like the Seventh Circuit in Jenkins, the Fifth Circuit has required procedures contrary to those chosen by Congress, but it has done so not only for those §1983 cases in which Congress authorized exhaustion, as in Jenkins, but also for those Congress intended to leave unaffected by an exhaustion requirement. A fortiori the petition for certiorari here should be granted.

III. THE REMAND ORDER IS INCONSISTENT WITH THIS COURT'S RULING IN McNEESE v. BOARD OF EDUCATION, THAT, AT THE LEAST, ADMINISTRATIVE EXHAUSTION MAY NOT BE REQUIRED UNLESS THE DEFENDANTS DEMONSTRATE THE ADEQUACY OF ADMINISTRATIVE REMEDIES, AND THAT ADMINISTRATIVE REMEDIES ARE INADEQUATE WHERE THE OFFICIALS AT THE END OF THE ADMINISTRATIVE PROCESS ARE NOT EMPOWERED TO GRANT RELIEF.

Petitioner has urged that a writ of certiorari should issue to reverse summarily the decision below, or to set the case for full consideration, because it is inconsistent with this Court's repeated decisions and with recently expressed Congressional intent. But even if the Court rejects those arguments, certiorari is warranted here because the judgment below is inconsistent with even the narrowest reading of McNeese v. Board of Education, which stands at least for the rule that 1) exhaustion may not be

considered where the state has not carried its burden of proving the adequacy of state administrative remedies, and 2) such remedies are not adequate where the ultimate administrative officals to which plaintiff will be remanded have no enforcement power without petitioning a state court. 373 U.S. at 674-76. Here, the defendants had a full opportunity to carry that burden. That they failed to do so is apparent from the Court of Appeals' conclusion that the record was inadequate "to tell whether state administrative remedies were adequate in the context of the rights asserted by plaintiff..." 55a. Accordingly, the judgment below was in error.

The judgment below is also in direct conflict with the second part of the McNeese holding, which found an administrative remedy inadequate where even

if the official at the end of the administrative process agreed that grievants had been injured, he was unable to grant relief himself, but could only petition the state courts (through the Attorney General) for relief. "It would be anomolous," the Court stated, "to conclude that such a remedy forecloses suit in the federal courts where the most it could produce is a state court action that would have no such effect." 373 U.S. at 675.

The record below showed precisely the same defects of administrative remedy eight Justices found inadequate in McNeese. Judge Hatchett's description of this Kafkaesque system (which the majority took no issue with) is as follows (112-114a):

> We need only consider Patsy's plight to appreciate the delay inherent in even a well-intentioned state administrative procedure. Upon a determination by the trial that the administrative remedy is adequate, Patsy must utilize the

Florida International University (FIU) career service employee (CSE) grievance procedure set forth in 6C8-4.05 of the Florida Administrative Code (See Appendix, Table I). If these procedures culminate in an unfavorable ruling, Patsy may then apply to the Florida Human Relations Commission (HRC) under procedures outlined in 9D-9 of the Florida Administrative Code (See Appendix, Table II).

The CSE Procedure

The CSE procedure requires that Patsy attempt to seek redress from her superior and others in the FIU chain of command. If FIU personnel fail to follow CSE procedures, Patsy may seek redress from the Florida Director of Personnel in the Department of Administration. The Director may request compliance from FIU personnel, but if this request is denied Patsy is left without a remedy since the Director lacks enforcement authority.

Upon the issuance by FIU personnel of an unfavorable decision, Patsy may refile her grievance with the Director only if she alleges that the University failed to follow the Florida Administrative Code. The Director may then issue a final decision. Once again, though, the Director lacks authority to enforce his decision.

The HRC Procedure

If Patsy is dissatisfied with either the ruling of FIU personnel or the decision of the Director, she may file a complaint with the Human Relations Commission. The HRC procedure can be extremely time consuming. e.g., Hargis v. Leon County School Board, II Florida Administrative Law Reports 957-A (1980) (HRC decision issued more than a year and a half after the filing of complaint).

Additionally, the Human Relations Commission lacks independent enforcement power. In order to enforce its decisions, the Commission must petition the appropriate Florida circuit court, and appeal an unfavorable ruling. See Fla.Stat.Ann. 120.69.

As that description makes clear, the Director of Personnel in the Department of Administration, who has a kind of oversight responsibility at the first stage of the administrative proceeding, the CSE procedure, has no power to compel petitioner's state employer to follow the required procedures even if he finds that those procedures have not been

followed. Nor does the CSE procedure provide for a hearing or compulsory process, provisions that even the deficient McNeese procedures employed.[16/]

Far worse, however, is the ineffectiveness of the final stage of the administrative remedy, the HRC procedure, if petitioner is unsuccessful at the first stage. Even if the Florida Human Relations Commission agrees with petitioner's claim of discrimination, it has no power to enforce its decision. It may seek enforcement in the Florida Circuit Court, but it need not do so. Fla.Stat.Ann.

16/ Differing with the majority as to the efficacy of the administrative remedy, Justice Harlan relied on the use of compulsory process to show that "the administrative remedy was intended as serious business and not as an exercise that might abort before fulfillment." 373 U.S. at 678 (Harlan, J. dissenting).

§120.69(1)(a). And even if it does, the respondent (i.e., the employer) may then relitigate the entire claim as a matter of right. Fla.Stat.Ann. §120.69(5).[17/]

The HRC therefore has even less power than the "inadequate" administrative body in McNeese, which at least had theoretical power to cut off funds to the erring school district, McNeese, supra at 675-676, and was required to seek to enforce any violations it found. The HRC's power is merely advisory, [18/] and it may decline to seek enforcement at all. This case is

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17/ Alternatively, if the HRC finds for petitioner but declines to seek enforcement, petitioner could seek enforcement in the circuit court after waiting 60 more days. Fla.Stat.Ann. §120.69(1)(b). Again, however, the employer can relitigate the entire claim. §120.69(5).

18/ This was also the fault with the administrative procedure in Burrell v. McCray, supra, where the Court granted certiorari to consider the §1983 exhaustion question, but dismissed the writ after argument. The ineffectiveness of the remedy available in Burrell is discussed in the brief for the ACLU amicus curiae in Burrell, at 7 n.1, 10-11.

like McNeese, however, in one other respect which the McNeese Court relied on heavily in rejecting exhaustion there. Neither in McNeese nor here is the §1983 claim "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." 373 U.S. at 674. Thus, the concerns underlying such cases as Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) do not support exhaustion here.

In sum, after exhausting state administrative remedies, and gaining final administrative agreement that her rights had been violated, plaintiff would then be forced to institute (or have instituted for her) a state court lawsuit. McNeese held that exhaustion of a far more expeditious system, but which also required resort to state courts for enforcement, could not be required. Therefore, even were this

Court not inclined to grant certiorari to resolve the conflict between its previous holdings that exhaustion may not be required, and the judgment here requiring such exhaustion as a matter of course, this case warrants review to ensure that administrative exhaustion is at least not required where it lacks substantial assurance of being plain, speedy, and administratively effective.[19/]

19/ Although what constitutes sufficient simplicity, effectiveness, and speed may vary in different circumstances, here the provisions of §1997e provide a Congressionally-approved benchmark which should be controlling assuming arguendo that exhaustion could ever be required in non-prisoner §1983 cases. "Once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished." Northwest Airlines v. Transport Workers Union, supra, 48 U.S.L.W. at 4388 n.34. Under those minimum standards, the Florida procedures outlined in Judge Hatchett's dissent, 112a n.7, 121a-127a, do not nearly pass muster.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, and summarily reverse the judgment below. In the alternative, certiorari should be granted, and the Court should vacate the judgment below and remand for reconsideration in light of 42 U.S.C. §1997e, or set the case for full argument.

Respectfully submitted,

CHARLES S. SIMS
(Counsel of Record)
BRUCE J. ENNIS, Jr.
E. RICHARD LARSON
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Counsel for Petitioner

APPENDIX A

No. 79-2965

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

GEORGIA PATSY, Plaintiff-Appellant, v. FLORIDA INTERNATIONAL UNIVERSITY, Board of Regents of the State of Florida, a body corporate, for and on behalf of Florida International University, Defendant-Appellee.	)	ORDER

Before: COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, and THOMAS A. CLARK, Circuit Judges.

RONEY, Circuit Judge:

This section 1983 sex and race discrimination suit was dismissed on motion for failure to allege exhaustion of state administrative remedies. A panel of this Court reversed on the ground that exhaustion of ad-

ministrative remedies is not a prerequisite of a section 1983 suit. Patsy v. Florida International University, 612 F.2d 946 (5th Cir. 1980). We took this case en banc for the purpose of considering whether to adhere to an automatic rule that no section 1983 plaintiff need pursue state administrative procedures before asserting federal court jurisdiction, regardless of the adequacy of relief that might be there available, or whether to adopt a more flexible rule that would require such exhaustion in appropriate cases. Deciding to take the latter course, we remand the case to the district court for it to consider the adequacy of administrative procedures available to this plaintiff in light of the rule here adopted.

Plaintiff is a white female employed as a secretary at Florida International University (FIU). Asserting 28 U.S.C.A. §1343(3) jurisdiction of her action authorized by 42 U.S.C.A. §1983, plaintiff alleges that during her employment with FIU, she has applied for numerous employment openings in the university for which

she was clearly qualified but has been uniformly rejected because FIU has discriminated against her on the basis of her race and sex. Plaintiff contends that by seeking out individuals from minority groups to hire and promote and by segregating applicants' files according to race and sex, FIU is engaged in a pattern and practice of discrimination, in violation of the Constitution and laws of the United States.

Plaintiff named as defendant the Board of Regents of the State of Florida on behalf of Florida International University. She prayed that the court remedy the discrimination against her by promoting her to the next available position to which she had applied and for which she was qualified or, in the alternative, to award $50,000 actual and punitive damages. The Board of Regents moved to dismiss on the ground that plaintiff had failed to exhaust her administrative remedies. The district court granted the motion to dismiss.

In this en banc rehearing we consider whether, under relevant Supreme Court holdings, exhaustion of adequate state administrative remedies can ever be a prerequisite to actions under section 1983 and, if so, whether we should adopt such a rule in this Circuit. In concluding that exhaustion of state administrative proceedings should sometimes precede federal court consideration of section 1983 claims, we first, examine the exhaustion doctrine as traditionally applied to suits against Government officers, second, review the Supreme Court cases to determine that they do not foreclose a flexible exhaustion rule in section 1983 cases, third, examine the state of the law in the other Courts of Appeals, which reveals a conflict on the point, and fourth, consider the objections to and the policy considerations for the implementation of an exhaustion requirement. Deciding after this analysis that exhaustion should be required

under certain standards, we then review the case before us and conclude that the district court's dismissal should be vacated and the case remanded for full consideration of the adequacy of the administrative procedures available to plaintiff to determine whether exhaustion is required in light of our opinion in this case.

I. The Exhaustion Doctrine

It has long been established that a party will normally be denied judicial relief for injury until available administrative remedies have been exhausted. As the Supreme Court stated in one of the leading cases dealing with the exhaustion doctrine, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938):

> [T]he long settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the

> prescribed administrative remedy has been exhausted.

The rule applies in federal courts to both state and federal administrative remedies, and has been said to be of special force in federal-state cases. Ilinois Commerce Commission v. Thomson, 318 U.S. 675, 63 S.Ct. 834, 87 L.Ed. 1075 (1943); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 58 S.Ct. 199, 82 L.Ed. 276 (1937); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159, 49 S.Ct. 282, 73 L.Ed. 652 (1929). As the Court explained in Public Service Commission v. Wycoff Co., 344 U.S. 237, 246-47, 73 S.Ct. 236, 241-42, 97 L.Ed. 291 (1952):

> Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review....

* * * * * * *

...State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact.

Many of the important policy purposes of the doctrine requiring exhaustion of federal administrative proceedings as a precedent to judicial relief were articulated by the Supreme Court in McKart v. United States, 395 U.S. 185, 193-95, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969): (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administra-

tive process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."

When the complaining party seeks federal court review of state action, the reasons stated in McKart are overlaid by forceful considerations of federalism and comity which counsel the exhaustion of administrative relief before the intervention of the federal judiciary into the dispute. K. Davis, Administrative Law §20.01 (Supp. 1970). Cf. National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976)(state autonomy in certain employment decisions); Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)(non-intervention of federal courts

in pending state court action absent exceptional circumstances); Railroad Commission v. Pullman Co., 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1949) (abstention because of "scrupulous regard for the rightful independence of the state governments").

Like most judicial doctrines, the requirement of exhaustion of administrative remedies is subject to numerous practical exceptions which result from the efforts of the courts to balance the rights of the claimants against the substantial policy factors favoring the rule. Briefly, the traditional exceptions are first, exhaustion is not required when the prescribed administrative remedy is plainly inadequate because either no remedy is available, the available remedy will not give relief commensurate with the claim, or the remedy would be so unreasonably delayed as to create a serious risk of irreparable injury. Walker v.

Southern Railway, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294 (1966); Frozen Food Express v. United States, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 730 (1956); United States v. Joseph A. Holpuch Co., 328 U.S. 234, 66 S.Ct. 1000, 90 L.Ed. 1192 (1946); United States Alkali Export Association v. United States, 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945); 3 K. Davis, Administrative Law §20.07 (1958 and Supps. 1970, 1976 & 1978).

Second, when the claimant seeks to have a legislative act declared unconstitutional and administrative action will leave standing the constitutional question, exhaustion is not required. Public Utilities Commission v. United States, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958); Davis, supra at §20.04.

Third, courts do not require exhaustion when the question of the adequacy of the administrative remedy is for all practical

purposes co-extensive with the merits of the plaintiff's claim, such as when, for example, the plaintiff contends that the administrative system itself is unlawful or unconstitutional in form or application. Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975); Finnerty v. Cowen, 508 F.2d 979, 982-83 (2d Cir. 1974).

Fourth, exhaustion of administrative remedies is not required if it would be futile to comply with the administrative procedures because it is clear that the claim will be rejected. City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 54 S.Ct. 259, 78 L.Ed. 628 (1934); Montana National Bank v. Yellowstone County, 276 U.S. 499, 48 S.Ct. 331, 72 L.Ed. 673 (1928).

It should be noted that the application of the exhaustion doctrine with its traditional exceptions is far from an exact science. Indeed, as Professor Davis has stated, in applying the exhaustion rule,

"judicial action is variable and difficult or impossible to predict." Davis, supra at §20.01 (1958). This is because "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S. at 193, 89 S.Ct. at 1662. In most situations the decision to require exhaustion or not comes after careful analysis and thoughtful balancing of the interests for and against exhaustion. The question presented in this case is whether the Court in section 1983 cases may and should take the analytical approach normally applied whenever administrative remedies are available or whether it should automatically except every section 1983 case from the requirement, as seems to have been done in many cases.

II. Exhaustion in Section 1983 Cases

A. Supreme Court Cases

The initial inquiry in this determination is whether the point is open for decision under cases that have been decided by the Supreme Court. Although the simple statement that "exhaustion of administrative remedies is not required in section 1983 cases" has support in the language of some opinions, a careful analysis of the holdings of the Supreme Court leads us to conclude that there is room for this Court to develop an analytical rule.

The Supreme Court held in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that it is not a prerequisite to filing an action under 42 U.S.C.A. §1983 that state judicial remedies be exhausted. The question of administrative remedies was not before the Court. In McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963), a subsequent section 1983

case, the Supreme Court was confronted with the issue of exhaustion of both judicial and administrative remedies. McNeese was a school desegregation case in which the primary administrative remedy available was that the residents of the school district could file a complaint with the Superintendent of Public Instruction alleging racial segregation. He could then set a hearing and after the hearing, if he decided the allegations were substantially correct he could request the Illinois Attorney General to file suit. Alternatively, it was suggested that the Superintendent could refuse to certify the school and then withhold state funds.

The Court first stated that it had "previously indicated that relief under the Civil Rights Act may not be defeated because relief was not sought under state law," and quoted the language from Monroe v. Pape which held that state judicial remedies need not be exhausted. 373 U.S. at 671, 83 S.Ct.

at 1435. The Court then held that the plaintiffs did not have to exhaust state judicial remedies and that abstention was inappropriate. Upon reaching the question of administrative remedies, the Court said:

> Moreover, it is by no means clear that Illinois law provides petitioner with an administrative remedy sufficiently adequate to preclude prior resort for protection of their federal rights.

373 U.S. at 674-75, 83 S.Ct. at 1437. After examining the administrative remedies at some length and noting their ineffectiveness in responding to petitioners' complaints, the Court concluded that "[w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." Id. at 676, 83 S.Ct. at 1438.

It is quite clear that exhaustion of administrative remedies would not have been required in McNeese under the traditional rule because a clear-cut exception-inadequacy

of administrative remedy-was applicable. In fact, the administrative process could afford no direct relief. Nevertheless, from McNeese and subsequent Supreme Court pronouncements relying on McNeese has grown the rule, followed by a majority of the circuits, that exhaustion of state administrative remedies is absolutely never required in section 1983 suits. Whether or not such a sweepingly broad and inflexibly wooden rule was ever intended by the Supreme Court, the following examination persuades us that the Supreme Court does not now follow such a rule in practice and that if such a rule is ever to be sustained by that Court, it would be only after the issue is squarely presented and thoroughly considered.

In its two most recent section 1983 cases involving exhaustion of state administrative remedies, the Supreme Court's analysis and language strongly suggest that it does not adhere to a rigid no-exhaustion rule. Barry

v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979), was a section 1983 action involving the New York State Racing and Wagering Board. Plaintiff Barchi was the trainer of a horse found to be drugged following a race. Plaintiff's license as a trainer was temporarily suspended without a hearing under a state regulation making the trainer responsible for the horse's condition and presuming that if drugs are found the trainer is at fault. New York procedures permitted a suspended licensee to have a post-suspension hearing but did not permit the suspension to be stayed during the course of the hearings. Furthermore, neither the statute nor the regulations specified a time limit within which a hearing had to be heard and the Board was permitted 30 days after the hearing in which to issue a final order.

Without resorting to these post-suspension hearing procedures, Barchi filed

suit alleging that the state statute was unconstitutional because it permitted his license to be suspended without a prior hearing to determine his culpability and because a summary suspension could not be stayed pending a post-suspension hearing by the Board. One of the grounds on which the state officers opposed the suit was that Barchi should have exhausted his administrative remedies prior to commencing his court action.

In concluding that the lack of a timely post-suspension hearing was unconstitutional, the Court considered the state's exhaustion argument:

> We reject appellants' further contention that Barchi should not have commenced suit prior to exhausting the procedure contemplated under §8022. Under existing authority, exhaustion of administrative remedies is not required when "the question of the adequacy of the administrative remedy... [is] for all practical purposes identical with the merits of [the plaintiff's] law-

> suit." Gibson v. Berryhill, 411 U.S. 564, 575, 93 S.Ct. 1689, 1696, 36 L.Ed.2d 488 (1973).

443 U.S. at 63 n.10, 99 S.Ct. at 2648, n.10 (brackets and deletions in original). Significantly, the Court did not merely recite a blanket no exhaustion rule. Instead, it excused Barchi's failure to comply with the procedures provided by the state by focusing on one of the usual exceptions to the general rule that state administrative remedies should be exhausted.

Justice Brennan in a concurring opinion agreed that exhaustion was not required and, like the majority, did not rely on a rigid blanket rule. Rather, he found two exceptions to the general rule that exhaustion is required. First, he said that the district court properly declined to require exhaustion of "state remedies that were themselves being challenged as unconstitutional." 443 U.S. at 68-69, 99 S.Ct. at 2651. Second, he described the administrative procedures as an

"exercise in futility" and stated that for that reason the plaintiff should not be required to exhaust his state administrative remedies. Id. at 74, 99 S.Ct. at 2654.

By going to the trouble of finding and using traditional exceptions to the exhaustion rule, the Justices plainly did not adhere to a rigid rule that exhaustion is never required in section 1983 cases. That the Court would permit a more flexible approach is supported by Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). The plaintiffs there were licensed optometrists who sought to enjoin proceedings against them pending before the Alabama Board of Optometry. In their section 1983 suit they alleged the Board was biased and could not provide a fair and impartial hearing. The Supreme Court agreed with the three-judge district court that the plaintiffs should not be required to exhaust state administrative remedies, but specifi-

cally left open the question whether the non-exhaustion exception in section 1983 cases was "invariably the case."

In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion, or factfinding is involved. But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. §1983. McNeese v. Board of Education, 373 U.S. 668 [83 S.Ct. 1433, 10 L.Ed.2d 622] (1963); Damico v. California, 389 U.S. 416 [88 S.Ct.

526, 19 L.Ed.2d 647] (1967). Whether this is invariably the case...is a question we need not now decide; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of appellees' lawsuit.

411 U.S. at 574-75, 93 S.Ct. at 1695-96 (emphasis added, footnotes omitted).

The significance of this language was not lost on the two concurring justices, Justice Marshall and Justice Brennan. From their brief one-paragraph concurrence, it was clear to them that the majority of the Court may have been making room for a holding that exhaustion may sometimes be re-

quired.

> I join the opinion of the Court except insofar as it suggests that the question remains open whether plaintiffs in some suits brought under 42 U.S.C. §1983 may have to exhaust administrative remedies.

411 U.S. at 581, 93 S.Ct. at 1699 (Marshall, J., concurring).

We are aware of the numerous instances in which the Court has stated in opinions, apparently quite categorically, that exhaustion is not required in section 1983 cases. But the simple fact of the matter, as one commentator has noted, is that "in all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." Developments in the Law-Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1274 (1977). Accord, Secret v. Brierton, 584 F.2d 823 (7th Cir. 1979); Blanton v. State University of New York, 489 F.2d 377, 383-84 (2d

Cir. 1973); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970); Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U.Chi.L.Rev. 537, 544-47 (1974). Individual examination of each section 1983 case mentioning exhaustion of state administrative remedies bears this out. Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967) (per curiam); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); and Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972)(per curiam), all involved welfare recipients seeking to have various state laws or regulations declared unconstitutional. In each case it was beyond the authority of the administrative agency to declare a state statute or regulation unconstitutional and thus the administrative remedies were clearly inadequate. Houghton v. Shafer, 392 U.S. 639,

88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968) (per curiam) and Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971) (per curiam) were both cases in which state prisoners sued prison officials. In Houghton, the Supreme Court specifically noted that to require exhaustion of administrative remedies would be to demand a futile act. In Wilwording, the lower court had suggested that plaintiffs should be required to exhaust certain state judicial remedies, Wilwording v. Swenson, 439 F.2d 1331 (8th Cir. 1971), so any language about state administrative remedies was dictum. Similarly, in Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) and Ellis v. Dyson, 421 U.S. 426, 95 S.Ct. 1691, 44 L.Ed. 2d 274 (1975), the issue before the Court was whether plaintiffs could enjoin possible future state criminal prosecutions, so the discussion of exhaustion of state administrative remedies was merely dictum. On the

basis of this authority, it cannot be fairly said that the holdings of the Supreme Court require lower courts to apply mechanically a no-exhaustion-ever rule in section 1983 cases. This analysis of the Supreme Court cases is essentially that also made by the Second and Seventh Circuits in Eisen v. Eastman, 421 F.2d at 567-69; Blanton v. State University of New York, 489 F.2d at 383-84; and Secret v. Brierton, 584 F.2d at 825-28.

In addition to the strong statements in Gibson v. Berryhill and Barry v. Barchi and the weakness of Supreme Court authority for an ironclad rule, there are a number of other indications that the Supreme Court would permit a flexible approach. In Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), Justice Powell noted in his concurrence:

> In some instances the Court has drifted almost accidentally into rather extreme interpretations of the post-Civil War Acts. The most striking example is the

> proposition, now often accepted uncritically, that 42 U.S.C. §1983 does not require exhaustion of administrative remedies under any circumstances. This far-reaching conclusion was arrived at largely without the benefit of briefing and argument.

427 U.S. at 186 n.*, 96 S.Ct. at 2602 n.* (Powell, J., concurring).

Recently, three other members of the Court have made it clear that they do not consider the no-exhaustion exception in section 1983 cases to be the final word. In his dissent from the denial of certiorari in City of Columbus v. Leonard, 443 U.S. 905, 99 S.Ct. 3097, 61 L.Ed.2d 872 (1979), Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, declared the time had come to re-examine the case underpinning the no-exhaustion exception, Monroe v. Pape.

> [T]he time may now be ripe for a reconsideration of the Court's conclusion in Monroe that the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal

> one is invoked. [365 U.S.] at 183 [81 S.Ct. at 481]. As noted earlier, the Court believed that this conclusion followed from the purpose of the Civil Rights Act "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." Id. at 174 [81 S.Ct. at 477] (emphasis added). But this purpose need not bar exhaustion where the State can demonstrate that there is an available and adequate state remedy. Indeed, scholarly commentators have soundly criticized the Court for holding to the contrary....I would take the opportunity afforded by this case to reconsider the Court's conclusion as to exhaustion of state remedies. Not only is the Court's conclusion open to serious question, as noted earlier, but the conclusion was reached in an almost off-the-cuff manner, in distinct contrast to that portion of Monroe overruled by the Court in Monell [436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611].

443 U.S. at 910-11, 99 S.Ct. at 3101. (Rehnquist, J., dissenting).

In at least one instance the Supreme Court declined to follow the rule that a section 1983 action is not precluded by failure to exhaust state remedies. The

plaintiff in Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), was unsuccessful in a state nuisance action aimed at shutting down his theater for a year, but instead of appealing the judgment within the state court system, immediately filed a section 1983 action seeking declaratory and injunctive relief. Although disclaiming any intention to undermine Monroe v. Pape, the Supreme Court held that, absent Younger-type extraordinary circumstances, the plaintiff was required to exhaust his state appellate remedies before he could commence a section 1983 action in federal court. While this holding provides no direct support for eliminating an exhaustion of administrative remedies requirement, it is another significant piece of evidence that the no-exhaustion rule is not etched in stone, at least as far as the Supreme Court is concerned.

Our discussion of Supreme Court cases

is not intended to suggest that they compel the conclusion we reach here. In truth they have been analyzed with much the same premise as Judge Friendly articulated in Eisen v. Eastman, 421 F.2d 560, 568 (2d Cir. 1969), cert. denied, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970), where he said:

> [T]he consequences of compelling federal courts to pass upon all complaints of unconstitutional acts by state and local officials at the lowest level, without any requirement of appeal to higher ones, would be so destructive to proper concepts of federalism and so needlessly burdensome to the federal courts that it is appropriate to examine whether the decisions have not been given a broader sweep than the Court intended.

Additionally we are concerned about a doctrine which opens the doors of the federal courthouse immediately to a citizen suing a state officer for violations of constitutional or federal law, when the same doors would be closed to that citizen suing a federal officer for a similar violation until administrative

remedies had been pursued. A concern for this unevenness of treatment of state officials and federal officials by federal courts may necessarily create an atmosphere which welcomes the result we here reach. In any event, our review of the cases convinces us that they do not prevent a decision to take an analytical rather than a mechanical approach to the question of exhaustion of administrative remedies and to require in appropriate cases that adequate state administrative remedies be exhausted before a section 1983 plaintiff comes into federal court.

B. Circuit Court Cases

Since this Court is sitting en banc, neither opinions of prior panels of this Court nor the decisions of other circuits control this deliberation. A review of prior Court of Appeals cases is helpful, however, to an informed decision. The dis-

covery that the circuits are divided on the point in cases which stand uncorrected by the Supreme Court bolsters the conclusion that the door has not been closed to a non-mechanical rule of exhaustion.

Six circuits, including this one, the Third, Fourth, Sixth, Eighth and Tenth, have decided cases that apparently hold that exhaustion of state administrative remedies is never a prerequisite to a section 1983 suit. United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226 (3rd Cir. 1977); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), cert. dismissed as improvidently granted, 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978), cert. denied, 443 U.S. 911, 99 S.Ct. 3101, 61 L.Ed.2d 876 (1979); Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975).

These decisions have simply concluded that the Supreme Court has laid down a blanket rule.

Four other circuits, the First, Second, Seventh and Ninth, have apparently determined there is no such airtight rule, and have used a more flexible approach. See generally Annot., Exhaustion of State Administrative Remedies as Prerequisite to Federal Civil Rights Action Based on 42 U.S.C.S. §1983, 47 A.L.R. Fed. 15 (1980).

The Second Circuit has consistently ruled that a section 1983 action cannot be maintained if the plaintiff has failed to exhaust adequate state administrative remedies and if none of the other traditional exceptions to the exhaustion rule applies. Gonzalez v. Shanker, 533 F.2d 832 (2d Cir. 1976); Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975); Blanton v. State University of New York, 489 F.2d 377 (2d Cir. 1973); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969),

cert. denied, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970). The Second Circuit reads the Supreme Court cases as merely condemning a "wooden application" of the exhaustion doctrine to section 1983 cases. 421 F.2d at 569.

The Seventh Circuit in Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978), after analyzing the recent Supreme Court cases, decided that a non-rigid approach to exhaustion is permitted under the Supreme Court decisions and that a state prisoner should exhaust his administrative remedies before filing a section 1983 claim in federal court alleging that his personal property was unlawfully confiscated without due process of law.

The Ninth Circuit "has not gone so far" as to infer a blanket no-exhaustion-under-any-circumstances rule from the Supreme Court cases. Canton v. Spokane School District #81, 498 F.2d 840, 844 (9th Cir. 1974). In that

circuit, exhaustion of adequate administrative remedies is required if the plaintiff seeks to forestall a threatened future deprivation of civil rights. Id. at 844-45. See also Bignall v. North Idaho College, 538 F.2d 243, 246 (9th Cir. 1976); Toney v. Reagan, 457 F.2d 953 (9th Cir. 1972), cert. denied, 409 U.S. 1130, 93 S.Ct. 951, 35 L.Ed. 2d 263 (1973). Exhaustion is not required if plaintiff claims relief from or compensation for a deprivation of civil rights which has already occurred. Whitner v. Davis, 410 F.2d 24, 28 (9th Cir. 1969).

The First Circuit in a footnote discussion in Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973), focused on the issue of ripeness. While rejecting a general or automatic requirement of administrative exhaustion in section 1983 cases, it adhered to the necessity for ripeness "to the extent that there must be at least some definitive administrative or institutional determination before a

§1983 action may arise." 488 F.2d at 751 n.3. Subscribing to the view expressed in our own case of Stevenson v. Board of Education, 426 F.2d 1154, 1157 (5th Cir.), cert. denied, 400 U.S. 957, 91 S.Ct. 355, 27 L.Ed.2d 265 (1970), the First Circuit requires a section 1983 plaintiff to pursue the administrative process until the action has sufficient institutional finality to be ripe for adjudication. Raper v. Lucey, 488 F.2d at 751 n.3. The court in Palmigian v. Mullen, 491 F.2d 978, 981 n.5 (1st Cir. 1974), left open whether in section 1983 prisoner's actions an inmate may be required to exhaust readily available and adequate administrative procedures specially designed for the very grievance in issue.

III. Objections and Policy Considerations

Having determined that under relevant Supreme Court authority this Court may take an analytical approach to the question of

exhaustion of state administrative remedies in section 1983 cases, and having seen that several of our sister circuits have already done so, we must now decide whether we should take such an approach.

There are two basic arguments for a blanket rule that no exhaustion of administrative remedies is required in any section 1983 case. First, it is argued that an exhaustion requirement would thwart the purposes of Congress in enacting section 1983. Second, it is argued that the elimination of an exhaustion prerequisite is justified because, given the nature of the rights protected by section 1983, claims for their protection are entitled to be adjudicated in the federal courts.

Although an additional argument could be made that a mechanical rule is easy to understand and apply, we reject it out of hand because of the important interests that might be unthinkingly sacrificed on that altar

of expediency. Instead, we examine the two principal arguments that could reasonably support a no-exhaustion rule.

In Monroe v. Pape, the Supreme Court examined at length the historical background and legislative intent of Congress in enacting section 1983. The Court discerned three main aims for the legislation: (1) to override certain kinds of state laws that were inconsistent with federal law; (2) to provide a federal remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy was available in theory but not in practice. 365 U.S. at 173-74, 81 S.Ct. at 476-77. In the view of the Court, Congress was least concerned with nullifying state laws. Its quarrel was not with state statutes then on the books, but with their lack of even-handed enforcement. Id. at 174-75, 81 S.Ct. at 477. Discriminatory state statutes present, however, the strongest case for not

requiring exhaustion, because in such cases administrative procedures are unlikely to provide any significant relief. But as one commentator has persuasively argued, even in the case of discriminatory state laws,

> categorical rejection of exhaustion is inappropriate. Assuming a state statute is inconsistent with federal law, exhaustion may be appropriate for the purpose of developing a factual record, receiving the benefit of agency expertise in the administration of its statutes and rules, and allowing the agency to limit the application of the statute consistently with federal law. Only where a factual record is irrelevant and the statute is both facially unconstitutional and incapable of any appropriate construction is exhaustion without value.

Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U.Chi.L.Rev. 537, 553 (1974)(footnote omitted).

Far from thwarting congressional intent, a requirement of exhaustion of adequate state remedies is wholly consistent with the second and third congressional purposes

identified in Monroe v. Pape, that is, the provision of a federal remedy where the state remedy is inadequate on its face or in practice. "If Congress sought to provide a federal remedy where the state remedy is not adequate in fact, it follows that the legislative intent required adequate remedies to be exhausted." Comment, 41 U.Chi. L.Rev. at 553. Although the federal courts must inquire into the actual efficacy of the state administrative procedure, once it is found to provide an adequate remedy, an exhaustion requirement is consistent with a section 1983 purpose to provide a federal remedy where a state remedy is inadequate or not available in practice.

Regardless of congressional purpose or intent, however, the question remains as to whether the nature of every section 1983 claim entitles it to immediate adjudication in the federal courts. McNeese v. Board of Education,

373 U.S. at 674, 83 S.Ct. at 1437. It must be kept in mind that we are here dealing with state administrative remedy exhaustion, not state judicial exhaustion. Unlike judicial actions, state administrative proceedings carry no res judicata or collateral estoppel baggage into federal court. Resorting to appropriate and adequate state administrative remedies in no way precludes federal court protection of federal constitutional and statutory rights. At most it can only delay federal court action, at best it could eliminate the need for such action. The proper focus should be on relief from wrong, and the adequacy of the administrative system to provide a remedy, not on the federal origin of the right that was violated.

There are important policy reasons for requiring a potential section 1983 plaintiff to exhaust adequate and appropriate state administrative remedies. The following discussion does not necessarily arrange them in

the order of importance, nor does it attempt to delve into all the nuances of argument for and against. The purpose here is to set forth the considerations which to this Court are controlling.

First, exhaustion promotes a wiser allocation of judicial resources, and does so in a variety of ways. To begin with the most obvious, the administrative process may resolve the dispute in a manner wholly satisfactory to the complainant. In that case, no judicial action at all will be required. The administrative process may also serve to focus the contentions of the parties and eliminate extraneous issues, thereby simplifying any resulting litigation. In cases where the facts are significant, during the administrative process the agency can sift through complicated factual matters and reduce issues of fact, thus aiding the court in making its findings of fact. Yet another potential benefit is that the agency may be

able to construe or interpret statutes or regulations in such a way as to resolve the complainant's grievance or to avoid a constitutional conflict. Permitting the administrative process to function may also allow the agency to define the contours of a yet uninterpreted statute or regulation and alleviate the necessity of having the federal courts guess about its meaning.

Second, a reasonable exhaustion requirement will assure that "the action complained of is final within the institution in the sense that it is ripe for adjudication." Stevenson v. Board of Education, 426 F.2d 1154, 1157 (5th Cir.), cert. denied, 400 U.S. 957, 91 S.Ct. 355, 27 L.Ed.2d 265 (1970). If the university or the Board of Regents is being sued, it should be clear that the university or the Board is responsible for the alleged wrong, instead of some first echelon functionary. As then Chief Judge Brown stated:

> [I]t must be clear that the body having responsibility, in response to specific complaints, has for the legal entity involved, failed or refused to take corrective action. The street light in my block may be inadequate, and unequal to another neighborhood, but until I can seek a §1983 order from a federal Judge, I must at least allow the city of Houston to turn me down. This is good sense. It is good federalism. It is good nineteen eighty-threeism.

Hawkins v. Town of Shaw, 461 F.2d 1171, 1177 (5th Cir. 1972)(en banc)(Brown, C.J., concurring)(emphasis in original). Involved in the ripeness concept are notions of fairness. Many would think it simply unfair to be summoned into federal court to defend against a constitutional claim where they have contrary policies and machinery to right alleged wrongs in an orderly fashion, but are given no reasonable opportunity for that machinery to operate.

Third, a reasonable exhaustion requirement will improve the administrative

process itself. Prompted by appropriate judicial decisions, the state administrative agency will have the incentive and be able to hone its procedures to comply with federal requirements, both procedural and substantive, without losing the advantage of the agency's expertise, its familiarity with local conditions and awareness of the impact of particular action on related areas, and its desire to correct errors of lower level functionaries within the agency. The proper roles of the officials within the agency will be solidified when the errors of lower level functionaries are corrected within the agency instead of by the courts.

Fourth, administrative remedies are generally simpler, speedier and less expensive for the parties themselves. Under a no-exhaustion rule plaintiffs, of course, would have a choice between court and administrative procedures. Defendants, however, have a genuine interest in solving conflicts with

the least court cost and attorney fees. Failure to require utilization of administrative remedies which might well achieve the same or a better remedy than could be obtained in court is wasteful of a litigant's resources.

Fifth, of serious importance to the judicial system's response to the concept of dual constitutional government, a requirement that a plaintiff complaining of state action must first exhaust state administrative remedies is supported by fundamental notions of federalism and comity. The policy here has at least three significant bases. First, the citizens of a state have a constitutionally based interest in autonomously running the state business and government to the fullest extent possible, until it collides with the federal constitution. The constitutional collision should come, if at all, at the end of state action, not at the beginning. An early law review

note on the subject articulates this concern as follows:

> A strong state interest is reflected in the establishment of a comprehensive scheme of regulation; authority over the subject matter of the dispute has been vested in an expert supervisory body, far more familiar than a federal court with local factors that legitimately affect administration. Moreover, the states, as well as the federal government have an interest in providing a means whereby official abuse can be corrected without resort to lengthy and costly trial....[A] federal court adjudicating a suit under the Civil Rights Act must consider the implications of division of responsibility under a federal system of government. The development of the exhaustion doctrine represented, at least in part, an attempt to minimize intergovernmental friction by deferring to the maximum extent possible to the interest of the states in ordering and regulating their own affairs.

Note, Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum.L.Rev. 1201, 1206-07 (1968)(footnotes omitted). Second, much of the work of the federal courts even since that law note was written has been to

establish rules and regulations under which the states must operate to meet due process and other constitutional requirements. That effort is of little practical value if the parties the courts have sought to protect by improving the state procedural structure can turn their backs on state administrative remedies and go directly into a federal forum. Good faith efforts by the states to provide protection for such parties are discouraged when federal courts encourage ignoring state administrative remedies. Third, plaintiffs are required to exhaust federal administrative remedies. As Professor Davis queried, "Why are not the reasons for requiring exhaustion of state remedies stronger than the reasons for requiring exhaustion of federal remedies, on account of all the reasons behind the abstention doctrine?" K. Davis, Administrative Law §20.01 at 646 (Supp. 1970). In terms of comity, why should not state defendants have at least

the same rights as federal defendants in suits against them for alleged governmental wrongs?

IV. The Decision

Considering the policy factors which so heavily favor the imposition of an exhaustion requirement, we are compelled to conclude that adequate and appropriate state administrative remedies must be exhausted before a section 1983 action is permitted to proceed in federal court, absent any of the traditional exceptions to the general exhaustion rule. In so holding, we make it clear that we deal only with the question of what must be done procedurally before a section 1983 action is prosecuted in federal court. This decision in no way limits the range of substantive rights for which section 1983 provides a remedy.

In determining whether the administrative remedies available to a particular plain-

tiff are adequate and appropriate, the courts should look to the large body of law applying the exhaustion requirement in non-section 1983 contexts. In view of the importance of the rights protected by section 1983, however, certain minimum conditions must be met before resort to state administrative remedies can be made a prerequisite to proceeding under section 1983. First, an orderly system of review or appeal must be provided by statute or written agency rule. Second, the agency must be able to grant relief more or less commensurate with the claim. Third, relief must be available within a reasonable period of time. Fourth, the procedures must be fair, and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims. Fifth, interim relief must be available, in appropriate cases, to prevent irreparable injury and to preserve the litigant's rights under section 1983 until the administrative process has been concluded.

Where these minimum standards are met, the court will need to further consider the particular administrative scheme, the nature of the interest the plaintiff seeks to protect, the values served by the exhaustion doctrine, and the proper balance of these interests in this type of case. See McKart v. United States, 395 U.S. at 193, 89 S.Ct. at 1662.

Contrary to the suggestion that the adoption of an exhaustion of administrative remedies requirement will somehow "turn back the clock" on civil rights law, we think that a carefully devised, well-monitored exhaustion requirement might well advance the cause of potential civil rights litigants. The resulting development of speedy and effective state administrative procedures for the vindication of 1983 transgressions could make available less expensive, less time consuming, more accessible, easily understandable procedures. For all litigants

alike, but most particularly for those potential litigants who are neither so poor that they lose nothing by protracted federal court litigation nor so rich they can afford the risk of loss without financial worry, carefully constructed procedures within their own state and especially within their own agency should be a step forward, not backward. To suggest that administrative procedures are not up to the task of dispute resolution in 1983 controversies is to ignore a century of development in this widely accepted field of jurisprudence. To confuse substance with procedure is to obfuscate the purpose of the rule here adopted.

V. The Present Case

In the complaint in this case, plaintiff alleged employment discrimination against her because she was white and a female. The complaint did not mention any effort to obtain relief through administrative procedures.

The Board of Regents filed a short motion for dismissal "because the plaintiff has failed to exhaust her administrative remedies." In a supporting memorandum, the Board's attorney asserted that the rules of the university prohibit race and sex discrimination in its employment practices and that certain administrative procedures were available for anyone who has been aggrieved in equal employment opportunity. The memorandum said:

> As a Career Service employee, Ms. Patsy has access to several administrative grievance procedures in the State University System. The administrative rules of the Department of Administration Career Service System, Division of Personnal provide that each Career Service employee or applicant shall be assured of an equal opportunity in all agency employment practices without regard to that person's "race, color, sex, religion, creed, national origin, political opinions or affiliations, or age" except as provided by law. Fla. Admin. Code, Chapter 22A-15.02 (1). These rules also provide for a comprehensive complaint, review and appeal procedure for any career service employee or applicant who feels he or she

> has been aggrieved with respect to equal employment opportunity. Id., Chapter 22A-15.05. The Department of Administration also requires each agency to establish written procedures for handling grievances of Career Service employees. Id., Chapter 22A-10.04. As a result of this requirement, the administrative rules of the Department of Education, Florida International University provide a comprehensive method of handling the grievances of its Career Service employees. Id., Chapter 6C8-4.05. Under these rules, Ms. Patsy could have initiated an adequate and readily available grievance procedure after the denial of any of her applications. Id., Chapter 6C8-4.05 (2)(a).

The memorandum further stated that the Board of Regents "has the power to remedy any practices which violate the University System's commitment to nondiscrimination and equal employment opportunity."

In a responsive memorandum, the plaintiff simply argued that exhaustion of state administrative procedures is not required in section 1983 causes of action. The district court, apparently without hearing

and without examining the adequacy of the administrative remedies available to plaintiff or any exceptions to the exhaustion rule, dismissed the complaint.

The district court correctly rejected the wooden application of the no-exhaustion requirement in section 1983 cases asserted by plaintiff. The record reflects, however, that it would have been impossible for that court to tell whether state administrative remedies were adequate in the context of the rights asserted by plaintiff, or whether she had in fact bypassed adequate remedies.

We therefore remand the case to the district court with directions to permit plaintiff to amend her complaint and then to apply the principles set forth in this opinion in determining whether plaintiff should be required to exhaust state administrative remedies before bringing this action. If the district court finds there are appropriate administrative remedies that

plaintiff should exhaust, it may dismiss her complaint without prejudice. If the court finds on examination an exception to the requirement of exhaustion, then the case can proceed accordingly.

VACATED AND REMANDED WITH INSTRUCTIONS.

ALVIN B. RUBIN, Circuit Judge, with whom VANCE, FRANK M. JOHNSON, Jr., HATCHETT and SAM D. JOHNSON, Circuit Judges, join, dissenting:

The majority opinion is both a scholarly and pragmatic exposition of the reasons why Section 1983 claimants should in some cases be required to resort to administrative remedies before entering federal court. The evident fault lies not in its logic but in its eventual, albeit respectful, disregard for the numerous instances in which the Supreme Court has stated, "apparently quite categorically, that exhaustion is not required in Section 1983 cases,"[1] p. 906, and in its reli-

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1. Among these cases are Ellis v. Dyson, 421 U.S. 426, 432-33, 95 S.Ct. 1691, 1694-95, 44 L.Ed.2d 274
(Footnote continued on next page)

ance on inferences drawn from Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36

(Footnote continued from preceding page) (1975); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Allee v. Medrano, 416 U.S. 802, 814, 94 S.Ct. 2191, 2200, 40 L.Ed.2d 566, 580 (1974); Steffel v. Thompson, 415 U.S. 452, 472, 94 S.Ct. 1209, 1222, 39 L.Ed. 2d 505 (1974); Preiser v. Rodriguez, 411 U.S. 475, 492-93 n. 10, 93 S.Ct. 1827, 1837-38 n. 10, 36 L.Ed.2d 439 (1973); Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972); Wilwording v. Swenson, 404 U.S. 249, 251-52, 92 S.Ct. 407, 409, 30 L.Ed.2d 418 (1971); Houghton v. Shafer, 392 U.S. 639, 640, 88 S.Ct. 2119, 2120, 20 L.Ed.2d 1319 (1968); King v. Smith, 392 U.S. 309, 312 n. 4, 88 S.Ct. 2128, 2131 n. 4, 20 L.Ed.2d 1118 (1968); Damico v. California, 389 U.S. 416, 417, 88 S.Ct. 526, 527, 19 L.Ed.2d 647 (1967); McNeese v. Board of Education, 373 U.S. 668, 672, 83 S.Ct. 1433, 1435, 10 L.Ed. 2d 622 (1963). See 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3573, at 497-98 (1975). As one commentator has noted, "it is significant that the Court has never in fact required exhaustion of state administrative remedies in a [§] 1983 case." S. Nahmod, Civil Rights & Civil Liberties Litigation 145 (1979).

L.Ed.2d 488 (1973).[2] My brethren find emanations from these cases that lead them to believe a Supreme Court majority is willing to adopt a rule of administrative exhaustion, but in neither case did the Court abandon the doctrine it had so often previously iterated.

In its effort to escape the import of what the highest court has done, the majority opinion suggests that the Supreme Court spoke only in dicta in every instance where the rule has been stated. Statements of the rule may indeed generally have been dicta. See,

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2. Note that the no-exhaustion rule was categorically restated in Ellis v. Dyson, supra, decided in 1975, two years after the decision in Gibson v. Berryhill, which is relied upon by the majority. See Judge Hunter's thorough opinion in United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226 (3d Cir. 1977).

e.g., Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed. 2d 505 (1974).

In Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971) (per curiam), however, the Supreme Court did not discuss the adequacy of state remedies when it held that exhaustion of state administrative remedies was not required. The majority describes the statement in Wilwording as dictum because "the lower court had suggested that plaintiffs should be required to exhaust certain state judicial remedies." (P. 907. Emphasis in original.) However, the Court of Appeals decision, Wilwording v. Swenson, 439 F.2d 1331 (8th Cir. 1971), states, "The state administrative procedure act is available as are suits for damages . . . ." and required the

plaintiffs to exhaust "available state procedures before requesting equitable relief in the federal courts." In reversing this decision, the Supreme Court began with the observation that the Court of Appeals had required the plaintiffs to invoke possible alternatives including "perhaps other relief under the State Administrative Procedure Act." Wilwording, 404 U.S. at 250, 92 S.Ct. at 249. The per curiam succinctly observes: "The remedy provided by [the Civil Rights Act] 'is supplementary' to the state remedy and the latter need not be first sought and refused before the federal one is invoked," and cites three of its prior decisions.

In stating consistently that exhaustion is not required, the Supreme Court must have been aware of the

factors considered in the majority opinion and previously relied upon by the Second Circuit, speaking through Judge Friendly, in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1969). It must have been aware, too, that there are good reasons beyond mere precedent not to require exhaustion of state remedies. These include the desirability of giving to civil rights plaintiffs, many of whom are indigent, the swiftest and least costly form of relief. See Comment, Exhaustion of State Administrative Remedies Under the Civil Rights Act, 8 Ind.L.Rev. 565 (1975); Comment, Exhaustion of State Remedies Under the Civil Rights Act, 68 Col.L.Rev. 1201 (1968).

The Supreme Court was also aware that the statute later codified as section 1983 was enacted by Congress in the belief that the states, or at least some of them, would not provide remedies for constitutional deprivations inflicted upon their citizens. In Mitchum v. Foster, 407 U.S. 225, 240-41, 92 S.Ct. 2151, 2161, 32 L.Ed.2d 705 (1972), the Court quoted these statements from the debate over that statute:

[R]ecords of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights].

The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to protect the rights, privileges and immunities of citizens.

All the apparatus and machinery

of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.

See Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

The Congress that enacted Section 1983 had cause to doubt the willingness of state authorities to redress violations of federal constitutional rights, and to be especially troubled by the attitude of state officials in those states where such violations were so grievous as to generate the urgent need for federal legislation. Congress, therefore, did not require exhaustion of state judicial or administrative remedies and the

Supreme Court itself has never done so despite the Court's invocation in other situations of federalism as a basis for adopting abstention and other doctrinal reasons to withhold federal judicial action until state relief has been unsuccessfully sought.

When the court that is constitutionally designated as Supreme has spoken so often, so categorically and so recently, it is not meet for us, as an inferior court, to avoid the patent import of those judicial statements. Justification for our departure cannot be found in the requirement that claimants asserting violations of their rights by federal officials are required to exhaust their federal remedies. Those claims are founded in other statutes or on implied remedies. The Congress that enacted Section 1983 did not have the

faith in state administrative remedies that later Congresses undoubtedly had in the federal administrative remedies of their own creation. Indeed, Congress so doubted the dedication of the members of state executive branches that it enacted the very statute we now interpret. See Mitchum v. Foster, supra. Since 1871, Congress has not expressed a contrary legislative intent in the area of civil rights violations by state officials. Moreover, requiring resort to a nationally uniform federal administrative procedure is not the same as requiring pretesting of fifty diverse mechanisms whose personnel and procedures vary tremendously.

The majority may sense that, to some degree, Georgia Patsy's claim is not ripe for adjudication. We have insufficient information on appeal to

determine whether the defendant is truly "committed to conduct that would raise the proffered issues for decision." 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Civil §3532, at 247. The university's failure to act on Ms. Patsy's application may or may not have been sufficient to commit it to the role of adversary for purposes of this litigation. See Stevenson v. Board of Education, 426 F.2d 1154 (5th Cir. 1970), cert. denied, 400 U.S. 957, 91 S.Ct. 355, 27 L.Ed.2d 265 (1970). Ripeness, however, is an entirely separate doctrine from exhaustion of administrative remedies. United States ex rel. Ricketts v. Lightcap, supra; Stevenson v. Board of Education, supra. Ripeness is satisfied at the first moment when the controversy becomes justiciable; this moment may occur long before administrative remedies have been

exhausted if the parties are sufficiently adverse and the facts have been adequately developed, whether or not alternative forums are available. Questions about ripeness might warrant a remand to the district court, but such questions do not justify the adoption of the panoply of exhaustion rules.

No less than the majority, I welcome the increasing willingness of state administrators and judges to vindicate federal rights. Only Congress, however, may substitute a policy of congressional deference to state remedial devices whose adequacy the majority opinion must announce a rule regalia to define. I am troubled that, despite this attempt to fashion protection for the civil rights litigant, remedy-exhaustion may prove to be litigant exhaustion. Congress may still believe

that, in spite of the policy factors adduced by the majority, the federal courts are likely to provide a civil rights plaintiff with the swiftest, least costly and most reliable remedy, and that the litigant should have access to these portals without first passing through state administrative antechambers. In any event, it is not for this court to make such policy judgments in the face of consistent Supreme Court teaching to the contrary and subsequent apparent congressional concurrence in that doctrine for decades.

KRAVITCH, Circuit Judge, dissenting:

The majority, in a comprehensive opinion, advances compelling arguments for requiring exhaustion of state administrative remedies, where adequate, as a prerequisite to a § 1983 action. I do

not agree, however, that the language in any Supreme Court opinion cited authorizes a lower court to adopt this change. In my judgment, we are bound by the present rule of non-exhaustion until Congress amends the statute or the Supreme Court alters its interpretation.

I therefore dissent.

HATCHETT, Circuit Judge, with whom ALVIN B. RUBIN, VANCE, FRANK M. JOHNSON, Jr. and THOMAS A. CLARK, Circuit Judges join, dissenting:

I respectfully dissent.

The majority holds that "adequate and appropriate state administrative remedies must be exhausted before a section 1983 action is permitted to proceed in federal court absent any of the traditional exceptions to the general exhaustion rule." I dissent

because this holding contravenes numerous decisions of the nation's highest Court; presumes a congressional intent never articulated by Congress; usurps authority delegated to Congress; and turns the clock back to the 1950's by creating a procedural nightmare that can only have a "chilling effect" on civil rights litigation. In short, I dissent because I believe the majority opinion is both legally unsound and judicially inappropriate.

The majority makes much of the observation that administrative remedies were inadequate in each of the cases in which the Supreme Court has stated that a section 1983 plaintiff need not exhaust state administrative remedies. In my opinion this observation neither requires nor permits a lower court to institute an exhaution

rule for 1983 plaintiffs. As a tribunal bound by law and oath to follow the declarations of our highest Court, we must assume that the Supreme Court means what it says when reiterating, "apparently quite categorically, that exhaustion is not required in Section 1983 cases." Majority opinion, at 906. Why would the Supreme Court articulate an absolute no-exhaustion rule in cases in which it was admittedly unnecessary unless the Court intended the lower courts to adhere to that rule in all 1983 cases? We must not presume that the Supreme Court makes meaningless, gratuitous statements. Instead; we must give deference and substance to its repeated, unequivocal declaration that exhaustion

is not required in section 1983 cases.[1]

Numerous cases have presented the Court with an opportunity to recant its no-exhaustion declaration. Eminent

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1. As noted by Judge Rubin, the Supreme Court has made this unequivocal declaration in the following cases: Ellis v. Dyson, 421 U.S. 426, 432-33, 95 S.Ct. 1691, 1694-95, 44 L.Ed.2d 274 (1975); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Allee v. Medrano, 416 U.S. 802, 814, 94 S.Ct. 2191, 2200, 40 L.Ed.2d 566, 580 (1974); Steffel v. Thompson, 415 U.S. 452, 472, 94 S.Ct. 1209, 1222, 39 L.Ed. 2d 505 (1974); Preiser v. Rodriguez, 411 U.S. 475, 492-93 n. 10, 93 S.Ct. 1827, 1837-38 n. 10, 36 L.Ed.2d 439 (1973); Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct. 1232, 1234. 31 L.Ed.2d 569 (1972); Wilwording v. Swenson, 404 U.S. 249, 251-52, 92 S.Ct. 407, 409. 30 L.Ed.2d 418 (1971); Houghton v. Shafer, 392 U.S. 639, 640, 88 S.Ct. 2119, 2120, 20 L.Ed.2d 1319 (1968); King v. Smith, 392 U.S. 309, 312 n. 4, 88 S.Ct. 2128, 2131 n. 4, 20 L.Ed.2d 1118 (1968); Damico v. California, 389 U.S. 416, 417, 88 S.Ct. 526, 527, 19 L.Ed.2d 647 (1967); McNeese v. Board of Education, 373 U.S. 668, 672, 83 S.Ct. 1433, 1435, 10 L.Ed. 2d 622 (1963).

critics have urged the Court at least to restrict the scope of the rule to cases falling within the established exceptions to the exhaustion requirement.[2] Never has the Court retreated from its original pronouncement that exhaustion of state remedies is simply unnecessary to the institution of a section 1983 action. The significance of the Court's steadfast refusal in case after case to discard or diminish its no-exhaustion rule cannot be overestimated.

The Supreme Court did not announce its no-exhaustion rule in a vacuum.

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2. See, e.g., Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970)(Friendly J.); Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U.Chi.L.Rev. 537 (1974).

Prior to its decision in McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963), a frequent impediment to the prosecution of suits under section 1983 had been the requirement that a plaintiff exhaust adequate state administrative remedies before proceeding in federal court.[3] Commentators noted that prior to McNeese the "requirement that a plaintiff exhaust state administrative remedies before he may maintain a suit in equity under section 1983 was black letter law." Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv.L.Rev. 1486, 1500 (1969). The Court's no-exhaustion rule regarding state judicial

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3. Comment, Exhaustion of State Remedies Under the Civil Rights Act, 68 Col.L.Rev. 1201 (1968).

remedies, exemplified by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and the Court's no-exhaustion rule regarding state administrative remedies, announced in McNeese, together with their progeny represent a natural judicial effort to permit the full implementation of the Civil Rights Act of 1871.

Any "confusion surrounding these cases derives partly from the factual context of the cases (most fall within traditional 'inadequate' or 'futile' exceptions) and partly from the puzzling brevity of the courts' explanations for such a no-exhaustion rule." Comment, Exhaustion of State Administrative Remedies Under the Civil Rights Act, 8 Ind.L.Rev. 565, 570 (1975). Yet careful examination of the concerns of Congress and the decisions of the Sup-

reme Court should remove any confusion and solve any puzzle surrounding the Court's declaration of a no-exhaustion rule in all 1983 actions.

I. SECTION 1983 AND THE COURT

A. The Early History of Restrictive Judicial Interpretations

Section 1983 was enacted as part of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"). The section provides a private, federal remedy for persons deprived of federal rights under color of state law:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [42 U.S.C. § 1983.]

Though this language is broad and inclusive, section 1983 initially proved ineffective as a shield against state violation of federal rights. Restrictive judicial interpretation permitted a section 1983 action only to vindicate section 1983 offenses actually committed by the states. Civil Rights Cases 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883); United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1875).

In the 1940's, the Supreme Court began to allow full implementation of

the Civil Rights Act by recognizing the broad reach of the words "under color of state law." 42 U.S.C. § 1983. See Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); United States v. Classic, 313 U.S. 299, 61 S.Ct.1031, 85 L.Ed. 1368 (1941); Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). This new recognition of the substantive scope of section 1983, however, failed to remove the major procedural impediment to its full effectiveness: the judicially-created requirement of exhaustion of state judicial and administrative remedies. As late as 1960, less than 300 federal suits were brought under all of the civil rights acts. Administrative Office of the United States Courts, 1960 Annual Report of the Director 232, table C 2. "Section 1983, enacted as

part of the Civil Rights Act of 1871 to enforce the guarantees of the fourteenth amendment by providing a cause of action in federal court, lay dormant as a result of restrictive judicial construction until the Supreme Court's 1961 decision in Monroe v. Pape." Developments in the Law--Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1135-36 (1977).

B. The Seminal Decision of Monroe v. Pape

In Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), an Illinois resident sought damages under section 1983 from the City of Chicago and individual policemen for allegedly conducting an unconstitutional search of his home under color of state law. Since the alleged conduct of the policemen also violated Illinois law, the

action could have been brought under state law in state court. Although the Supreme Court concluded that the City of Chicago could not be sued as a "person" under section 1983, it held that the alleged conduct of the policemen which violated state law constituted "action under color of state law" and supported a section 1983 action in federal court without the necessity of exhausting state judicial remedies.

In concluding that exhaustion was unnecessary, the Monroe Court examined the history and purposes of section 1983. The Court identified these purposes as: (1) the overriding of particular state laws; (2) the provision of a remedy when state law was inadequate; and, (3) the creation of a federal remedy when the state remedy, though adequate in theory, was not

available in practice. Monroe, at 173-74, 81 S.Ct. at 476-77. These first three purposes could have been served by requiring a section 1983 plaintiff to exhaust his state judicial remedies whenever they are truly adequate. Since there had been no showing in Monroe that the state laws and procedures were in any way deficient, the Court's decision to permit federal suit without such exhaustion necessarily rested upon a critical fourth purpose underlying section 1983: the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe, at 183, 81 S.Ct. at 481; see, e.g., Developments in the Law--Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1170 (1977).

The majority opinion virtually ignores this clearly-stated and crit-

ically-important fourth purpose of providing a federal remedy through 1983 that is fully independent and supplementary. The majority merely argues that "[f]ar from thwarting congressional intent, a requirement of exhaustion of adequate state remedies is wholly consistent with the second and third congressional purposes identified in Monroe v. Pape, that is, the provision of a federal remedy where the state remedy is inadequate on its face or in practice." (Emphasis added.) Yet the decision today to institute traditional exhaustion requirements in 1983 cases clearly thwarts Monroe's fourth purpose of providing an independent, supplemental federal remedy.

The majority opinion does obliquely acknowledge this fourth supplementary purpose of section 1983 through extensive quotation of Justice Rehnquist's

dissent from the denial of certiorari in City of Columbus v. Leonard, 443 U.S. 905, 99 S.Ct. 3097, 61 L.Ed.2d 872 (1979). Joined by two other members of the Court, Justice Rehnquist concluded in this dissent that "the time may now be ripe for a reconsideration of the Court's conclusion in Monroe that the 'federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.'" Leonard, at 911, 99 S.Ct. at 3101. Apparently a super-majority of the Supreme Court disagreed; Justice Rehnquist could only dissent. His invitation to reconsider the supplementary nature of section 1983 thus represents nothing more than an invitation declined. At least Justice Rehnquist admits what this court would deny: the independence of 1983 from state remedies constitutes the established law of our highest Court, law which that

Court refused to reconsider as recently as 1979.[4]

C. Extension of Monroe to Administrative Remedies

Monroe referred only to the exhaustion of state judicial remedies. Yet the Monroe Court's recognition that Congress intended section 1983 to provide an independent and supplementary federal remedy

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4. Aside from the fact that Justice Rehnquist expresses no more than a dissenting view, his reasoning in Leonard cannot withstand scrutiny. In a portion of the dissent deleted by the majority opinion, Justice Rehnquist reasons that because the Court has recently overturned that portion of Monroe which rendered local governments immune from suit under 1983, "the time may now be ripe" for reconsideration of the other Monroe holding that the federal remedy is fully supplementary. The problem with this reasoning is that the Court overruled a portion of Monroe not to diminish its impact, but to realize the full reach of 1983 by making subsidiary local governments liable on the same basis as a state government. See Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56

(footnote continued on next page)

laid the foundation for extension of the exhaustion principle to administrative procedures.

This extention occurred in the 1963 decision of McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963). In McNeese, black students alleged racial discrimination in an Illinois public school system and brought suit under section 1983 for equitable relief. The administrative remedy available to the plaintiffs provided that residents could file a complaint with the Superintendent of Public Instruction, who would then hold a hearing. If the

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(Footnote continued from preceding page) L.Ed.2d 611 (1978). Developments after Monroe thus show an increase in the reach of section 1983, rather than foretelling its dilution through institution of an exhaustion requirement.

Superintendent decided that the allegations were correct, he would request the attorney general to bring suit in the state courts. The district and appellate courts dismissed the suit for failure to exhaust available administrative remedies.

Relying upon the fourth congressional purpose identified in Monroe, the Court in McNeese held that plaintiffs bringing suit under section 1983 were not subject to any exhaustion requirement: "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." McNeese, at 671, 83 S.Ct. 1435.

Admittedly, the McNeese Court also based its decision upon the finding that the state administrative remedy was inadequate, since it offered only "tenuous protection" to the plaintiffs' federal rights. McNeese, at 676, 83 S.Ct.

at 1438. The mere fact that the Court refused to base McNeese solely upon this inadequacy of the state remedy suggests that it intended to announce a no-exhaustion rule for all section 1983 cases. Moreover, subsequent Supreme Court interpretations of McNeese show that the Court views McNeese as establishing that state administrative procedures need not be exhausted even when they are adequate.

D. The Post-McNeese Decisions

Four years after McNeese, the Court decided Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967). In Damico the Court quoted McNeese for the proposition that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." Damico, at 417; 88 S.Ct. at 526 (quoting from

McNeese v. Board of Education, 373 U.S. 668, 671, 83 S.Ct. 1433, 1435, 10 L.Ed. 2d 622 (1963) (bracketed material added by the Damico Court). The Damico Court's insertion of the words "an administrative" indicates its desire to confirm that McNeese had completely abolished the administrative exhaustion requirement. To comprehend the full import of the insertion "an administrative," Justice Harlan's lone dissent in Damico must be considered. Significantly, Justice Harlan argued that McNeese did not govern in Damico because of the finding in McNeese that the state administrative remedy was inadequate. The majority of the Damico Court rejected Justice Harlan's restrictive view of McNeese; no Justice joined Justice Harlan's dissent.

The import of Damico and its lone dissent was apparent to commentators. As one thoughtful article stated:

> Prior to the 1967 term, the Supreme Court's treatment of the exhaustion requirement had been inconclusive. Last year, however, when the need for exhaustion was again urged upon the Court in Damico v. California, it was rejected summarily. Surprisingly, the question was treated as one governed by settled law.
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> . . . . .
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> The Supreme Court in Damico appears to have eliminated the exhaustion requirement in suits under the Civil Rights Act. The result is not surprising; recent pronouncements by the Court had perhaps foreshadowed this development. What is surprising is the summary nature of the opinion,

for neither of the two cases cited by the Court--McNeese and Monroe--mandated the result reached.

Comment, Exhaustion of State Remedies Under the Civil Rights Act, 68 Col.L.Rev. 1201, 1201-1202 (1968)(footnotes omitted). That the Court chose to treat the exhaustion question presented in Damico as one of "settled law" is of crucial significance. In short, Damico erased any doubt about exhaustion in 1983 cases by confirming that McNeese stands for the proposition that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." Damico, 389 U.S. at 417, 88 S.Ct. at 526.

It therefore matters little that in Damico "it was beyond the authority of the administrative agency to declare a state statute or regulation unconsti-

tutional and thus the administrative remedies were clearly inadequate." Majority opinion, at 907; accord, Secret v. Brierton, 584 F.2d 823 (7th Cir. 1979); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970). While administrative remedies may have been inadequate, the Damico Court refused to rest its decision on this ground, and indeed, did not even mention it. Even more important than the Court's lack of interest in the adequacy of remedies in Damico itself was the Court's interpretation of McNeese as rendering any inquiry into state administrative remedies simply irrelevant in 1983 actions.

In the next Supreme Court case treating administrative exhaustion, King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968), the Court again rejected the argument that exhaustion

applies to section 1983 cases:

> We reject appellants' argument that appellees were required to exhaust their administrative remedies prior to bringing this action . . . . Decisions of this Court . . . establish that a plaintiff in an action brought under the Civil Rights Act, 42 U.S.C. § 1983, 28 U.S.C. § 1343 is not required to exhaust administrative remedies where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court.

King v. Smith, at 312 n. 4, 88 S.Ct. at 2130 n. 4.

King was followed in the same term by Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968). On the facts of that case, exhaustion

would have been futile and, therefore, not required. The Supreme Court noted the probable futility of the available administrative process, but confirmed that "[i]n any event, resort to these remedies is unnecessary in light of our decisions in Monroe, McNeese, and Damico." Shafer, at 640, 88 S.Ct. at 2120. Can there be any doubt after reading the quoted Shafer language that the highest Court believes that a no-exhaustion rule had been established by the three prior cases?

In a subsequent habeas corpus case, Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971), the Court repeated the "[i]n any event" language of Shafer. In Wilwording, the Court stated that it had already established that a section 1983 plaintiff need not invoke state remedies before seeking a federal forum. Wilwording thus undermined the argument originally

forumlated by Judge Friendly in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970), and reiterated by today's majority that the Supreme Court has never held unambiguously that exhaustion is necessary when state remedies are adequate. As expressed by one commentator:

> The Supreme Court undermined Judge Friendly's argument in Wilwording v. Swenson, a habeas corpus case challenging state prison conditions. The Court rejected the suggestion that its holding in Shafer was based on the futility of the appeal: "Although the probable futility of such administrative appeals was noted, we held that 'in any event, resort to these remedies is unnecessary.'" The Court's willingness to extend its

> its liberalized exhaustion principle seemed unambiguous when it held in Wilwording that, for exhaustion purposes, the plaintiffs were entitled to have their habeas corpus claim treated as if it had been brought under section 1983.

Comment, Exhaustion of State Administrative Remedies Section 1983 Cases, 41 U. Chi. L.Rev. 537, 546 (1974)(footnotes omitted).

In a later section 1983 case, Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972), the Supreme Court vacated a lower court dismissal for failure to exhaust administrative remedies on the ground that Damico, "an indistinguishable case[,] . . . establishes that exhaustion is not required in circumstances such as those presented here." Carter, at 671, 92 S.Ct. at 1234. As in Damico, the constitutionality of the statute was in

issue and the adequacy of the administrative remedy was questionable. Once again the Supreme Court refused to rest its decision on the fact that the available administrative remedy was inadequate.

The majority opinion discusses and relies upon the subsequent decision of Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). This reliance on Gibson is misplaced, as noted by one law professor:

> [T]he [Gibson] Court intimated that perhaps exhaustion of state administrative remedies would be required in some 1983 cases as where, for example, "a license revocation proceeding has been brought by the state and is pending before one of its own agencies and where the individual charge is to be deprived of nothing until the completion of

that proceeding. . . ." [T]he following year the Court reiterated wihtout qualification, its long standing no-exhaustion rule for state administrative remedies. In this connection it is significant that the Court has never in fact required exhaustion of state administrative remedies in a 1983 case. S. Nahmod, Civil Rights and Civil Liberties Litigation, 145 (1979)(footnotes omitted). In addition to being repudiated by later cases, the language from Gibson quoted by Professor Nahmod and the majority constitutes no more than dictum.[5]

Promptly after Gibson, the Court

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5. See Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U.Chi.L.Rev. 537 (1974).

restated, without qualification, the established no-exhaustion rule in Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). "When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)-as they are here-we have not required exhaustion of state judicial or administrative remedies recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." Steffel, at 472-73, 94 S.Ct. at 1222. (Emphasis added.) The Court again stated the no-exhaustion rule in the subsequent case of Ellis v. Dyson, 421 U.S. 426, 95 S.Ct. 1691, 44 L.Ed.2d 274 (1975): "exhaustion of state judicial or administrative remedies in Steffel was ruled not to be necessary, for we have long held that an action under section 1983 is free of that requirement." Ellis, at 432-33, 95 S.Ct. at 1694-95.

The Court rendered Steffel and Ellis subsequent to Gibson. Both Steffel and Ellis contain clear pronouncements of the no-exhaustion rule. The majority opinion dismisses the statements as dicta. While the pronouncements may be dicta, they are relevant and revealing as Supreme Court interpretations of earlier Court precedent and should guide a lower court in understanding and following Supreme Court decisions. The unequivocal no-exhaustion statements in Steffel and Ellis thus refute the argument advanced by Judge Friendly in Eisen and restated by today's majority. As appreciated by Judge Hunter of the Third Circuit:

> After its decision in Gibson, the Court again reaffirmed its adherence to the rule that exhaustion is not required, without mentioning the adequacy of available remedies.

> Ellis v. Dyson, 421 U.S. 426, 432-33, 95 S.Ct. 1691 [at 1694-95], 44 L.Ed.2d 274 (1975); Wolff v. McDonald, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). These cases indicate that possible sentiments in Gibson have not come to fruition.

United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1230-31 (3d Cir. 1977).

As recently as 1979, the Court had an excellent opportunity in Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979), to overrule its no-exhaustion rule if such was the Court's desire. The real significance of Barry, cited by the majority is that the Court refused to retreat from the no-exhaustion rule prefigured by Monroe (1960), announced by McNeese

(1963), confirmed by Damico (1967), relied upon by King (1968), Shafer (1968), Wilwording (1971) and Carter (1972), reiterated after Gibson (1973) by Steffel (1974) and Ellis (1975), and reconfirmed by the rejection of Justice Rehnquist's dissent in Leonard (1979). Clearly the Court adheres to the no-exhaustion rule.

II. SECTION 1983 AND FEDERALISM

The majority opinion implies that in by-passing state administrative remedies the current no-exhaustion rule creates needless federal-state friction and thereby constitutes poor federalism. Good federalism, however, does not demand unreasoned acquiescence to state interests. Indeed, "Our Federalism," as described by Justice Black in Younger v. Harris, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed2d 660 (1971), requires a balancing of competing federal and state interests.

Admittedly, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 386,76 L.Ed. 747 (1932). (Brandeis, J., dissenting.) Yet it is equally true that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled." Justice Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L. Rev. 489, 503 (1977). The need for independent federal supplementation of state innovations is keenly apparent in the context of civil rights and section 1983.

The history of section 1983 shows that states should be free to devise improved mechanisms for protecting civil rights; litigants should be free to choose state-created remedies; but, the federal remedy should always be available independently. The predecessor of section 1983,

> [w]as enacted for the express purpose of "enforce[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13. The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and the constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era-and especially of the Fourteenth Amend-

ment, which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.

* * * * * *

Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century . . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial." Ex parte Virginia, 100 U.S. at 346, 25 L.Ed. at 679.

Mitchum v. Foster, 407 U.S. 225, 238-39, 242, 92 S.Ct. 2151, 2159-60, 2162, 32 L. Ed.2d 705 (1972).

This court has similarly explained the revolutionary nature of the Civil Rights Act and the remedy it created in the section now codified at 1983. In Moreno v. Henckel, 431 F.2d 1299, 1305 (5th Cir. 1970), we said:

> The Act was not one artfully phrased so as not to disturb the relationship between the States and the Nation. If there is one thing certain about the legislative history of the Act, it is that Congress, open-eyed, deliberately set out to alter the so-called "delicate balance" between the state and the federal government so that federal courts could effectively protect federal rights.

In deciding cases brought under section 1983, we must never forget that Congress intended to fundamentally change the relationship between the states and the nation with the Civil Rights Act. We must remember that Congress intended

the federal courts, endowed with the protections afforded by life-tenure, to serve as a barrier between the states and aggrieved individuals in the protection of civil rights.[6]

The alteration of our federal structure by act and amendment in the wake of the Civil War, and the resulting reliance upon the federal courts as primary protectors of civil rights, strongly argues against institution today of exhaustion requirements in section 1983 cases.

> [T]he absence of an exhaustion requirement in § 1983 is not an accident of history or the result of careless oversight by Congress or this Court. On the contrary,

---

6. See Developments in the Law-Section 1983 and Federalism, 90 Harv. L.Rev. 1133 (1977).

> the no-exhaustion rule is an integral feature of the statutory scheme. Exhaustion of state remedies is not required precisely because such a requirement would jeopardize the purposes of the Act.

Preiser v. Rodriguez, 411 U.S. 475, 518, 93 S.Ct. 1827, 1850, 36 L.Ed.2d 439 (1973)(Brennan, J. dissenting as to other matters). The difference noted by the majority between the requirement of exhaustion of federal administrative remedies in section 1983 cases and the absence of any requirement of exhaustion of state administrative remedies merely demonstrates the critical difference between the federal and state roles in the realm of civil rights. Compare McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)(articulating the reasons for requiring exhaustion of federal administrative remedies) with the line

of section 1983 cases refusing to require exhaustion of state administrative remedies. The paramount role of the federal government in the realm of civil rights, as envisioned by the Congress and the Constitution, is wholly inconsistent with today's dilution of the federal section 1983 remedy through imposition of a state exhaustion requirements.

> The development of the exhaustion doctrine represented, at least in part, an attempt to minimize intergovernmental friction by deferring to the maximum extent possible to the interest of the states in ordering and regulating their own affairs.
>
> However, ritual genuflection in the direction of federalism should be avoided. The states are not the only legitimately interested parties. A reasoned evaluation of the exhaustion requirement cannot be made without considering other factors which may outweigh the interest of the states in orderly recourse to their procedures. One of these is delay. Even without conscious state efforts to frustrate the assertion of unpopular rights by requiring recourse to dilatory remedial procedures-and an exhaustion rule does open the door to such efforts-the inevitable con-

> sequence of insistence on exhaustion is substantial delay in vindication of the constitutional rights of many complainants.

Comment, Exhaustion of State Remedies, 638 Col.L.Rev. 1201, 1206-7 (1968))footnotes omitted).

III. SECTION 1983 AND THE NO-EXHAUSTION RULE

There are many reasons why this court should not abolish the no-exhaustion rule. First, and fundamentally, the Supreme Court has enunciated and continually followed the no-exhaustion rule. As explained in Section I of this dissent, until such time as the highest Court rejects the rule, this court should steadfastly follow it.

Second, as explained in Section II, Congress did not intend to require exhaustion of state administrative remedies. If Congress intended at any time to require exhaustion of judicial remedies in section 1983 cases, it could have

easily expressed its disagreement with the Court's no-exhaustion rule by adopting the explicit statutory language often used in other areas. See, e.g., 28 U.S.C. §2254(b)(habeas corpus for state prisoners); 28 U.S.C. § 1342 (state rate orders); 28 U.S.C. § 1341 (state taxes). Further, Congress created the special remedy that is section 1983 after survey, public debate, and findings. Rather than abrogating the no-exhaustion rule by judicial fiat, this court should permit Congress to make any such alteration through the full and open legislative process.

Third, although it is often argued that administrative remedies should be exhausted because of the "expertise" of an administrative body, where federal issues are involved, no such "expertise" resides in state administrative agencies.

> A suit under the Civil Rights Act will often turn upon isolable issues of federal law, and involve federal [constitutional] rights of a particularly sacrosanct character. Insofar as the question is one of federal law, the federal court is the "expert" body. There is a strong federal interest in adjudicating these cases immediately, without any exhaustion of state procecures.

Comment, Exhaustion of State Remedies Under the Civil Rights Act, 68 Col.L. Rev. 1201, 1207-8 (1968)(Emphasis added.)

Fourth, there is a very real danger that the delay inherent in requiring use of state administrative process may discourage aggrieved individuals from seeking vindication of their rights.[7]

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7. We need only consider Patsy's plight to appreciate the delay inherent in even a well-intentioned state administrative procedure. Upon a determination by the trial court that the administrative remedy is adequate, Patsy must utilize the Florida International University (FIU) career service employee (CSE) grievance procedure set forth in 6C8-4.05 of the Florida Administrative Code (see Appendix, Table 1). If these procedures culminate in an unfavorable ruling, Patsy may then apply to the Florida Human Relations Commission (HRC) (Footnote continued on next page)

I agree with Judge Rubin that "the federal courts are likely to provide a civil rights plaintiff with the swiftest, least costly, and most reliable remedy." Dissent of J. Rubin, at 916.

(Footnote continued from preceding page) under procedures outlined in 9D-9 of the Florida Administrative Code (See Appendix, Table II).

The CSE Procedure

The CSE procedure requires that Patsy attempt to seek redress from her superior and others in the FIU chain of command. If FIU personnel fail to follow CSE procedures, Patsy may seek redress from the Florida Director of Personnel in the Department of Administration. The Director may request compliance from FIU personnel, but if this request is denied Patsy is left wihtout a remedy since the Director lacks enforcement authority.

Upon the issuance by FIU personnel of an unfavorable decision, Patsy may refile her grievance with the Director only if she alleges that the University failed to follow the Florida Administrative Code. The Director may then issue a final decision. Once again, though, the Director lacks authority to enforce his decision. (Footnote continued on next page)

Fifth, the majority opinion may create a time-consuming procedural nightmare, the curse of both litigants and federal trial judges.[8] After the filing

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(Footnote continued from preceding page)
The HRC Procedure

If Patsy is dissatisfied with either the ruling of FIU personnel or the decision of the Director, she may file a complaint with the Human Relations Commission. The HRC procedure can be extremely time consuming. E.g., Hargis v. Leon County School Board, II Florida Administrative Law Reports 957-A (1980)(HRC decision issued more than a year and a half after the filing of complaint).

Additionally, the Human Relations Commission lacks independent enforcement power. In order to enforce its decisions, the Commission must petition the appropriate Florida circuit court, and appeal an unfavorable ruling. See Fla.Stat.Ann. 120.6

8. This procedural nightmare will only encourage the filing of frivolous constitutional challenges. Since it is beyond the scope of an administrative agency to declare a state statute or regulation unconstitutional, litigants will strive to assert constitutional deficiencies in all cases in order to enter the federal courts directly.

of a section 1983 complaint, the defendant will likely move to dismiss on the ground that the state administrative remedies are adequate. To rule on this motion, the district court will not only have to examine state remedies, but also take testimony from knowledgeable persons as to how the administrative process really works. If the state administrative remedy is found adequate, the court will have to decide whether to dismiss the suit or retain jurisdiction. Presumably, the state's statute of limitations will be tolled during the ensuing period of exhaustion since the majority makes pursuit of state administrative remedies a prerequisite to federal suit. See, e.g., Bryant v. Potts, 528 F.2d 621 (5th Cir. 1976). If the plaintiff loses on every point of the state administrative claim, since neither res judicata

nor collateral estoppel apply, the plaintiff may then, having exhausted administrative remedies, return to the federal court to continue the suit.

Sixth, the typical state administrative process is not constituted to provide adequately for the award of costs and attorney's fees.[9] Thus, even when a litigant prevails in the state administrative process, he will still need to return to federal court for an award of costs and attorney's fees. By the time the prevailing plaintiff completes the procedural nightmare dictated by the majority opinion, costs and attorney's fees will be staggering.

---

9. In light of the usual absence of adequate provision for costs and attorney's fee, it is doubtful that state administrative procedures can ever be truly adequate.

Seventh, most administrative processes cannot adequately entertain class action claims. In the typical administrative setting, when an individual plaintiff is a member of a class and is suing to protect the rights of the class, an individual settlement may be satisfactory. Although satisfactory to the individual plaintiff, it may not protect other class members from like deprivations.

Eighth, assuming that considerations of federal-state friction avoidance are relevant, friction between the states and the federal judiciary can only increase under a system that requires federal courts to judge the adequacy of state administrative remedies.[10] Moreover,

---

10. As explained above, I am of the opinion, shared by others, that it is "very doubtful that considerations of friction-avoidance have any place in civil rights litigation in light of
(Footnote continued on on next page)

the majority opinion will in fact interfere with orderly state procedures. What will be the effect of a federal court ruling that a particular state administrative scheme is not adequate for the protection of litigants' constitutional rights? Will the state be under any duty to amend its statutes and regulations for the next litigant? If a state disagrees with this finding, may it appeal? May the state participate in the hearing regarding the adequacy of state remedies?

CONCLUSION

The majority opinion contravenes a Supreme Court rule consistently

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(Footnote continued from preceding page) the history and purposes of section 1983." Comment, Exhaustion of State Administrative Remedies Under the Civil Rights Act, 8 Ind.L.Rev. 565, 587 (1975); see also, Note, Section 1983: A Civil Remedy for the Protection of Federal Rights, 39 N.Y.U.L.Rev. 839 (1964).

applied by the Court in section 1983 cases. The majority opinion assumes a congressional intent never articulated by Congress, and, in so doing, usurps the role assigned to Congress by the Constitution. Most unconscionably, however, the majority opinion will have a "chilling effect" on civil rights litigation after Congress and the Court have struggled mightily to afford civil rights litigants speedy, inexpensive, and reliable redress for constitutional deprivations.

Exhaustion of state administrative remedies simply has no place in the civil rights context. I agree with Judge Friendly's conclusion that "[i]t is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the

states." H. Friendly, Federal Jurisdiction: A General View 90 (1973). Today's institution of an exhaustion requirement can only interfere with our performance of that most appropriate task.

TABLE I
Career Service Employee (CSE) Grievance Procedure
for Florida International University
Chart based upon procedures set forth in
Florida Administrative Code, Chapter 6C8-4.05

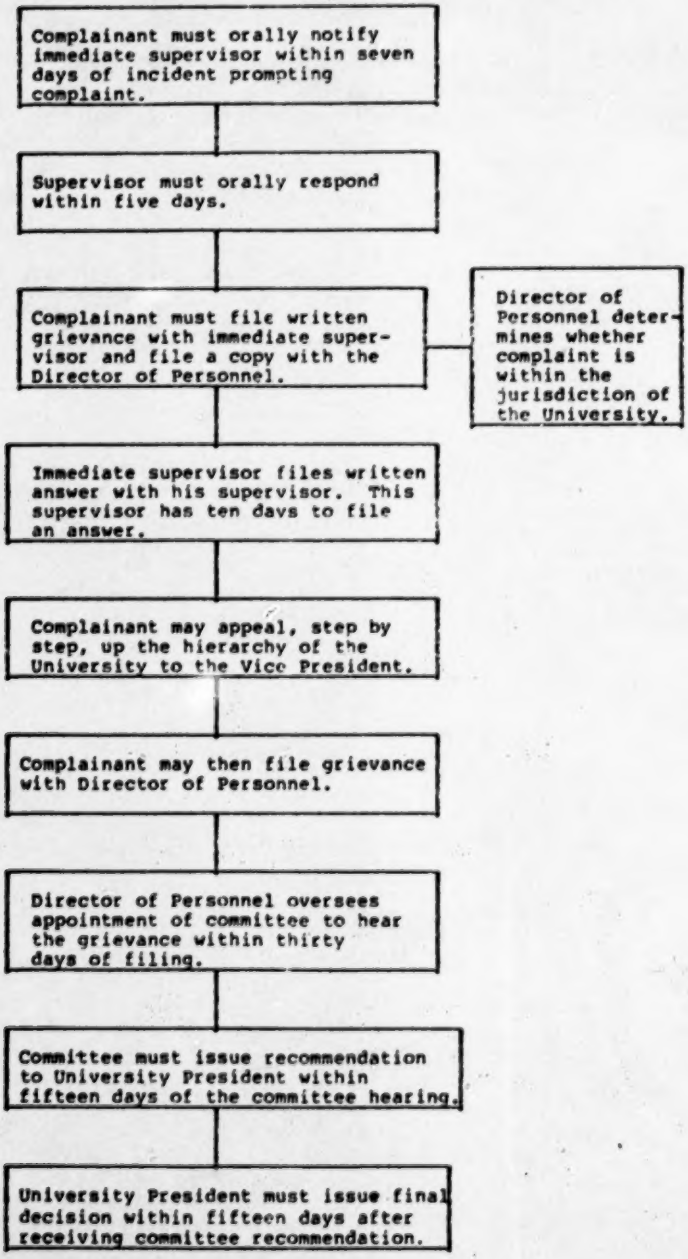
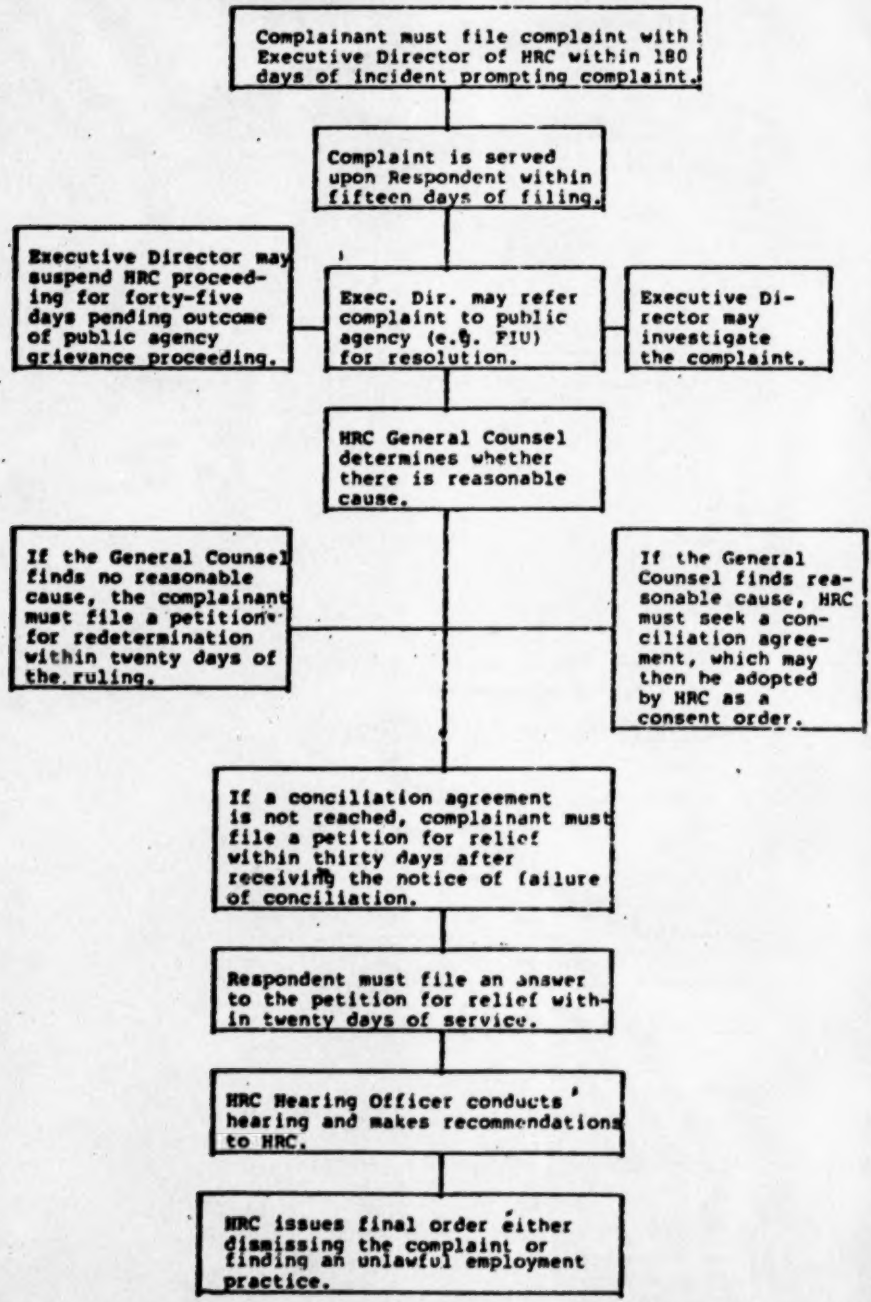


TABLE II
Human Relations Commission (HRC) Procedure
Chart based upon procedures set forth in
Florida Administrative Code, Chapter 9D-9



APPENDIX B

No. 79-2965

Summary Calendar.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

Feb. 28, 1980.

GEORGIA PATSY,)
Plaintiff-Appellant,)
v.)
FLORIDA INTERNATIONAL)
UNIVERSITY, Board of Regents)
of the State of Florida, a)
body corporate, for and on)
behalf of Florida Inter-)
national University,)
Defendant-Appellee.)

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

GODBOLD, Circuit Judge:

Appellant Georgia Patsy brought this action under 42 U.S.C. §1983 after her applications for employment with the University had been rejected a number of times. The district court dismissed the suit on the grounds that Patsy had not exhausted her administrative remedies within the state university system, relying on Penn v. Schlesinger, 497 F.2d 970 (5th Cir. 1974) (en banc), cert. denied, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976). Patsy appeals. We reverse and remand.

Exhaustion of administrative remedies is not a prerequisite of a § 1983

suit. See, e.g., Ellis v. Dyson, 421 U.S. 426, 432-33, 95 S.Ct. 1691, 1694-95, 44 L.Ed.2d 274 (1975)("Exhaustion of state judicial or administrative remedies . . was ruled not to be necessary, for we have long held that an action under § 1983 is free of that requirement"); Steffel v. Thompson, 415 U.S. 452, 472, 94 S.Ct. 1209, 1222, 39 L.Ed.2d 505 (1974) ("When federal claims are premised on 42 U.S.C. § 1983 . . . we have not required exhaustion of state judicial or administrative remedies"); Gibson v. Berryhill, 411 U.S. 564, 574, 93 S.Ct. 1689, 1695, 1696, 36 L.Ed.2d 488 (1973)("But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the

federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983"); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975). The district court's reliance on Penn v. Schlesinger, is misplaced, as that case involved § 1981, not § 1983.

Appellees also attempt to support the dismissal on grounds not considered by the district court. They argue that the University is not a "person" under § 1983, and that the Eleventh Amendment bars the suit. Since the district court did not rule on these contentions, we leave it to that court to address them first.

REVERSED and REMANDED.

APPENDIX C

No. 79-732-Civ-JAG

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

GEORGIA PATSY,	)	
Plaintiff,	)	
v.	)	O R D E R
BOARD OF REGENTS OF THE STATE OF FLORIDA, a body corporate, for and on behalf of Florida International University,	)	
Defendant.	)	

THIS CAUSE having come before the Court on Defendant's motion to dismiss for lack of jurisdiction for plaintiff's failure to allege exhaustion of admini-

strative remedies under principles enunciated by Penn v. Schlesinger 497 F.2d 970 (5th Cir. 1974), and having considered the motion and being otherwise duly advised,

It is thereupon

ORDERED AND ADJUDGED that Defendant's motion to dismiss be granted for Plaintiff's failure to exhaust administrative remedies.

DONE AND ORDERED at Miami, Florida, this 9th of July, 1979

s/ Jose A. Gonzalez, Jr.
UNITED STATES DISTRICT JUDGE

Copies furnished counsel

APPENDIX D

UNITED STATES
COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-2965

D.C. Docket No. 79-732-Civ-JAG

GEORGIA PATSY,
Plaintiff-Appellant,

versus

FLORIDA INTERNATIONAL UNIVERSITY, BOARD OF REGENTS of the State of Florida, a body corporate, for and on behalf of FLORIDA INTERNATIONAL UNIVERSITY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS

A. CLARK, Circuit Judges.*

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on defendant-appellee's petition for rehearing en banc without oral argument;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be, and the same is hereby vacated by the Court en banc; and that this cause be, and the same is hereby remanded to the said District Court with instructions in accordance with the opinion of this Court.

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*Judge Jerre S. Williams has become a member of the Court since this case was taken under submission. He elects not to participate in the decision.

January 22, 1981

RUBIN, Circuit Judge, with whom VANCE, FRANK M. JOHNSON, JR., HATCHETT and SAM D. JOHNSON, Circuit Judges, join, dissenting.

KRAVITCH, Circuit Judge, dissenting.

HATCHETT, Circuit Judge, with whom RUBIN, VANCE, FRANK M. JOHNSON, JR., and THOMAS A. CLARK, Circuit Judges, join, dissenting.

ISSUED AS MANDATE: MAR 10 1981

APPENDIX E

Section 7 of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997e, provides:

SEC. 7.EXHAUSTION OF REMEDIES.

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be

required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).

(b)(1) No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5,

United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide--

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant

to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated

under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this Act.

Office - Supreme Court, U.S.
FILED
DEC 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

CHARLES S. SIMS,
Counsel of Record
BRUCE J. ENNIS, Jr.
JOEL M. GORA
E. RICHARD LARSON
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

STEVEN R. SHAPIRO
New York, New York

AVIAM SOIFER
Cambridge, Massachusetts

Counsel for Petitioner

JEFFREY H. KLINK,
Counsel of Record
Mahoney, Hadlow & Adams
800 Barnett Bank Building
100 Laura Street
P.O. Box 4099
Jacksonville, Florida 32201
(904) 354-1100

MITCHELL D. FRANKS
Dept. of Legal Affairs
Office of the Attorney General
Suite 1501
The Capitol
Tallahassee, Florida 32301
(904) 488-1573

Counsel for Respondents

Petition for Certiorari Filed May 7, 1981
Certiorari Granted October 5, 1981

JOINT APPENDIX

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The opinions and judgments below are set forth as appendices to the Petition for Certiorari

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

GEORGIA PATSY

v.

BOARD OF REGENTS
of the State of Florida,
No. 79-732-CIV-JAG

RELEVANT DOCKET ENTRIES

1.	Complaint. ($500,000.00+).	Feb. 7, 1979
5.	Motion to dismiss complaint (Deft).	Mar. 5, 1979
6.	Memo of law in support of above motion. (Deft).	Mar. 5, 1979
9.	Memo in opposition to deft's motion to dismiss. (Pltf).	Mar. 12, 1979
11.	ORDER: Deft's motion to dismiss complaint GRANTED. Pltf have 20 days from date of order to file w/court amended complaint	Apr. 9, 1979
12.	Amended Complaint.	Apr. 19, 1979

RELEVANT DOCKET ENTRIES

14.	Motions to dismiss amended complaint & alternative motion for a more definite statement. (Deft Fla. Board of Regents)	June 14, 1979
15.	Memo in support of above motion. (Deft. Fla. Board of Regents)	June 8, 1979
17.	Memo in opposition to deft's motion to dismiss. (Pltf).	June 11, 1979
18.	ORDER: Deft's motion to dismiss GRANTED for pltf's failure to exhaust administrative remedies. (7/9/79-JAG)M-7/25/79.	July 9, 1979
19.	NOTICE OF APPEAL filed by pltf from Order dismissing pltf's complaint entered 7/9/79.	July 26, 1979
20.	COST BOND ON APPEAL in amount of $250.00 deposited w/registry of Court by pltf/appellant.	July 26, 1979

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2965

Brief for Appellant filed	Oct. 9, 1979
Brief for Appellee filed	Nov. 14, 1979
Reply Brief for Appellant filed	Dec. 4, 1979
Opinion, Reversed and Remanded	Feb. 28, 1980
Appellee's Petition for Rehearing En Banc filed	Mar. 17, 1980
Order for Rehearing En Banc	May 5, 1980
Brief for Appellant filed	May 21, 1980
Brief for Appellee filed	June 9, 1980
Opinion, Vacated and Remanded	Jan. 22, 1980

[CAPTION]

Complaint

COMES NOW, GEORGIA PATSY, Plaintiff herein, by and through her undersigned counsel, complaining of the above Defendant and for cause of action would respectfully show unto the Court as follows:

I.

JURISDICTION

1. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1343(3) which provides for original jurisdiction of this Court in all actions authorized by 42 U.S.C., Section 1983 to redress the deprivation under color of law of any right, privilege or immunity secured by the Constitution of the United States, specifically the Fifth, Ninth and Fourteenth Amendments.

II.

PRELIMINARY STATEMENT

2. GEORGIA PATSY, a white female American and an employee of the above captioned University, seeks redress for discrimination due to her race, suffered by her in violation of the Constitution and the laws of the United States. Specifically, Plaintiff alleges she has been denied employment opportunities for which she is well qualified within the above captioned University, while there has been an intentional and concerted effort by the University to promote and hire minorities to available positions for which Plaintiff has applied.

III.

PARTIES

3. GEORGIA PATSY, Plaintiff, is a citizen of the United States and a resident of the Southern District of Florida. Plaintiff is employed by FLORIDA INTERNATIONAL UNIVERSITY and has attained permanent status within the personnel system of the State of Florida.

4. The Defendant, FLORIDA INTERNATIONAL UNIVERSITY, is a Division of the State University of Florida and it possesses and exercises all powers necessary for the maintenance of an upper level university.

IV.

STATEMENT OF CLAIM

5. On June 1st, 1972, Plaintiff began employment as a Clerk Typist III, with Defendant University, and is presently classified as a Secretary III.

6. Plaintiff's education consists of a Bachelor of Education Degree (cum laude) from the University of Miami and a Master of Science Degree in Administration and Supervision of Adult Education from Florida International University. Plaintiff has had continuing teaching experience in the Dade County, Florida, Adult Education Program.

7. During the six (6) years while Plaintiff has been employed at the Defendant University, she has applied for numerous employment openings within the Defendant University and has been uniformly rejected with many Latins and non-whites having been selected in place of the Plaintiff.

8. The following is a partial list of available positions advertised by the Defendant for which Plaintiff applied for, but was rejected:

Position with Career Development and Placement Department

Interim Counselor in School Education

Liason Officer and Student Affairs Coordinator

Continuing Education Coordinator

Coordinator/Director Alumni Affairs

Vocational Counselor II

Personnel Aide

College Work-Study Coordinator

Conference Coordinator

University Public Functions Manager

Financial Aid Counselor

Student Affairs Coordinator

Admissions Counselor

9. The former President of FLORIDA INTERNATIONAL UNIVERSITY, Charles Perry has recognized that Plaintiff's background qualifies her for a higher position than the Secretary III position then and now held. See Exhibit "A" attached hereto and made a part hereof.

10. The professional skill and management abilities of the Plaintiff have been recognized by the Head of the Department of Psychology at FLORIDA INTERNATIONAL UNIVERSITY. See Exhibit "B" attached hereto and made a part hereof.

11. The Performance Appraisal conducted annually in accordance with the State of Florida Personnel System shows the Plaintiff to be outstanding, not only with respect to her assigned tasks, but innovative, resourceful, efficient and functioning more as a Staff Assistant than

as a Secretary. See Exhibit "C" (composite) attached hereto and made a part hereof.

11(a). The Defendant has engaged in employment practices which have discriminated against Plaintiff on the basis of her race and/or sex in the promotion of its employees.

12. The Defendant has maintained and continues to maintain a policy of preference to minority applicants for both available administrative and non-administrative positions which results in discrimination against the Plaintiff, a white-female, contrary to the Constitution and laws of the United States.

13. FLORIDA INTERNATIONAL UNIVERSITY has continually sought out individuals from minority groups to fill positions resulting in discrimination against the Plaintiff, contrary to the Constitution and laws of the United States. See Exhibits "D" and "E" attached hereto and made a part hereof.

14. FLORIDA INTERNATIONAL UNIVERSITY through its agents, deceived Plaintiff into believing that she was being considered for a position she applied for when in reality, Plaintiff's name had not been submitted as one of the final candidates for the position of Interim Counselor. See Exhibit "F" (composite) attached hereto and made a part hereof.

15. FLORIDA INTERNATIONAL UNIVERSITY not only rejected Plaintiff for positions for which she was qualified and had applied, but rejected Plaintiff for a position for which she had not applied. See Exhibit "G" attached hereto and made a part hereof.

16. FLORIDA INTERNATIONAL UNIVERSITY as further evidence of its discriminatory policies maintains files on qualified applicants for positions by segregating them as follows: White, Black, Male, and Female, contrary to Federal law and Equal Employment guidelines.

16(a). The acts and practices by the Defendant described in this complaint constitute a pattern and practice of resistance to the full enjoyment of the right to equal employment opportunities without distinction based on race and/or sex and such acts and practices are intended to deny the full exercise of rights secured by the Constitution and laws of the United States.

17. An actual controversy exists between the Plaintiff and Defendant in that Plaintiff contends that the actions of FLORIDA INTERNATIONAL UNIVERSITY are in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiff is in doubt as to her status and rights under the Constitution of the United States and seeks a declaration of the legal and constitutional rights of the parties with respect to the subject matter of this action.

18. Plaintiff will continue to suffer immediate and irreparable injury, loss of damage unless this Court grants the injunctive relief sought. There is no plain, adequate or speedy remedy at law to redress these deprivations.

V.

CLAIMS FOR RELIEF

19. There exists between the parties an actual controversy as heretofore set out. The Plaintiff is suffering and is threatened with immediate and irreparable injury as a result of the actions of the Defendant stated above. The Plaintiff has no plain nor adequate remedy at law to redress the wrongs and unlawful conduct complained of herein. FLORIDA INTERNATIONAL UNIVERSITY has severly damaged Plaintiff by its discriminatory practices and has painfully stigmatized Plaintiff, and continues to do so. By the actions of FLORIDA INTERNATIONAL UNIVERSITY, Plaintiff has been discriminated against and denied due process of law in violation of

her rights under the Fifth, Ninth and Fourteenth Amendments to the United States Constitution. The Defendant has acted in violation of Title 42, U.S.C., Section 1983, to inflict said deprivations on the Plaintiff.

WHEREFORE, Plaintiff prays this Honorable Court to enter the following relief:

A. Assume jurisdiction of this cause;

B. Enter a final judgment pursuant to 28 U.S.C., Section 2201, and Rule 57, of the Florida Rules of Civil Procedure declaring that the Plaintiff has suffered from acts of discrimination at the hands of the Defendant or its agents, contrary to the Due Process Clause of the Fourteenth Amendment;

C. Require Defendant to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendant to pay to the Plaintiff

the sum of $500,000 as actual and exemplary damages;

D. Assess all costs against the Defendant and award the same to the Plaintiff;

E. Award attorney's fees to the Plaintiff;

F. That the Court order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination complained of herein.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF EUGENE P. SPELLMAN
Attorneys for Plaintiff,
GEORGIA PATSY
100 North Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132

By: /s/
DENIS DEAN, SR.

By: /s/
EUGENE P. SPELLMAN

[CAPTION]

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b), Federal Rules of Civil Procedure, the defendant, Florida International University (hereafter "FIU"), respectfully moves this Honorable Court to dismiss the complaint against it for the following reasons:

1. The Court lacks subject matter jurisdiction because the defendant is not a "person" under 42 U.S.C. § 1983.

2. The defendant lacks the legal capacity to be sued.

WHEREFORE, FIU respectfully requests this Honorable Court to dismiss plaintiff's complaint against it with prejudice, and award FIU a reasonable attorney's fees.

Respectfully submitted,

GUY O. FARMER II
JEFFREY H. KLINK
Mahoney Hadlow & Adams
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

JOHN W. KOZYAK
Mahoney Hadlow & Adams
1401 First Federal Building
One Southeast 3rd Avenue
Miami, Florida 33131
(305) 358-5550

By /s/
Jeffrey H. Klink

[CAPTION]

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiff, a white female clerical employee at Florida International University ("FIU"), has sued FIU under 42 U.S.C. § 1983 alleging "reverse discrimination" regarding alleged promotion opportunities. (Complaint, ¶¶ 1, 11(a), 19) Plaintiff has also filed a motion to transfer this matter to the Honorable Judge Eaton on the grounds that he already has another "reverse discrimination" suit against FIU pending before him.

For the reasons discussed below, it is clear that the complaint against FIU should be dismissed with prejudice. Accordingly, the requested dismissal, if granted, would moot the motion to transfer.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE COMPLAINT AGAINST FIU BECAUSE IT IS NOT A "PERSON" WITHIN THE MEANING OF 42 U.S.C. § 1983.

The courts have consistently held that states and their agencies are not "persons" within the meaning of 42 U.S.C. § 1983. Vick v. Texas Employment Commission, 514 F.2d 734 (5th Cir. 1975); Cheramie v. Tucker, 493 F.2d 586 (5th Cir. 1974). In addition, the courts have also consistently held that state universities and their governing Board of Regents are state agencies, and thus not "persons" within the meaning of Section 1983. Ingraham v. Wright, 525 F.2d 909, 912 (5th Cir. 1976), cert. denied, 421 U.S. 952, aff'd on other grounds, 430 U.S. 651 (1977); Blanton v. State University of New York, 489 F.2d 377, 382 (2d Cir. 1973).

The recent U.S. Supreme Court decision of Monell v. Dept. of Social Services, ___ U.S. ___, 56 L.Ed. 2d 611 (1978) has not overruled these decisions with respect to state agencies being

considered "persons" under § 1983. In Monell, the United States Supreme Court held that local governments, municipal corporations, and/or local independent school boards are "persons" subject to liability under 42 U.S.C. § 1983. 56 L.Ed. 2d at 618. The Supreme Court also overruled Monroe v. Pope, 365 U.S. 167 (1967), but only insofar as it had completely immunized municipalities from suit under § 1983. Id. at 619. The Supreme Court explicitly noted that its holding was "limited to local government units which are not considered part of the State" for Eleventh Amendment purposes. (Emphasis added) Id. at 635 n. 54.

Thus, a fair reading of the Monell decision can only lead to the conclusion that it is limited to local government units that are not considered part of the state. The Fifth Circuit in Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978) has recently noted that the holding in Monell is so limited:

> The plaintiff contends that the recent Supreme Court decision in [Monell] . . . has abrogated the state's eleventh amendment immunity when it is sued pursuant to 42 U.S.C. § 1983. Nothing in Monell, however, goes that far. The Supreme Court explicitly noted that its Monell holding was "limited to local government units which are not considered part of the state for eleventh amendment purposes."

586 F.2d 399 at 410 (5th Cir. 1978).

In sum, the defendant FIU, as a state agency, is not considered to be a "person" within the meaning of § 1983. See Aldredge v. Turlington, TCA 78-0830, Order dated January 25, 1979 (N.D. Fla.) (A copy of this Order is attached). Therefore, the complaint against FIU should be dismissed with prejudice for lack of subject matter jurisdiction.

II. THIS COURT SHOULD DISMISS THE COMPLAINT AGAINST FIU BECAUSE IT LACKS THE CAPACITY TO BE SUED.

Pursuant to Rule 17(b), Federal Rules of Civil Procedure, defendant FIU's capacity to be sued is determined by Florida law. Byron

v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975). Under Florida law the individual public universities which comprise the State University System, including FIU, see Fla. Stat. §§ 239.01, 239.02, lack separate corporate existence and the capacity to be sued. Accordingly, the Court should dismiss FIU as a party defendant. Byron, supra, 403 F. Supp. at 54.

CONCLUSION

For the preceding reasons, defendant FIU respectfully requests this Honorable Court to dismiss the complaint against it with prejudice, and award FIU a reasonable attorney's fee, pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

GUY O. FARMER II
JEFFREY H. KLINK
Mahoney Hadlow & Adams
Post Office Box 4099
Jacksonville, Florida 3220
(904) 354-1100

JOHN W. KOZYAK
Mahoney Hadlow & Adams
1401 First Federal Building
One Southeast 3rd Avenue
Miami, Florida 33131
(305) 358-5550

By /s/
Jeffrey H. Klink

LAB12/G

[CAPTION]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

In spite of the decision in Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), it is still an unsettled question as to whether or not a "State" and/or one of its agencies or departments is considered a "person" for jurisdictional purposes under the Civil Rights Act, Title 42 U.S.C., Section 1983. There is no question but that Bogard takes the position that Monell v. Dept. of Social Services, 436 U.S. ___, 98 S.Ct. 2018 (1978) continues to preclude civil rights suits against State or their departments while at the same time permitting suits against "local government units". A close reading of Monell indicates no such limitation.

Mr. Justice Brennan, in footnote number 53 stated the following:

> "Since there is nothing in the 'context' of §1 of the Civil Rights Act calling for a restricted interpretation of the word 'person', the language of that section should prima facie be construed to include 'bodies politic' among the entities that could be sued."

and finally, the Monell concludes with a discussion of the Civil Rights Attorney's Fees Award Act of 1976, allowing attorney's fees to the prevailing party in a 1983 Civil Rights action. The Court pointed out in quoting from the Senate Report on the Bill that defendants in those cases are often states or local bodies and that it was intended that attorney's fees could be collected, if necessary, from the state or local government.

The Court in Monell concluded by stating as follows:

> ". . . there can be no doubt that Section 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed against, all forms of official violation of federally protected rights."

It should be noted that the question presented by the Defendant's motion to dismiss is, in effect, not whether or not FLORIDA INTERNATIONAL UNIVERSITY can be sued as a party defendant, but whether or not monetary damages can be obtained against that entity, since the Fifth Circuit Court of Appeals has entertained all actions against political subdivisions except those for money damages. Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970) cert. den. 400 U.S. 991, 91 S.Ct.451; Butts v. Dallas Independent School Dist., 436 F.2d 728 (5th Cir. 1971).

The Plaintiff herein has asked for money damages in the claim for relief only as an alternative to injunctive and equitable relief and clearly if this Court is of the opinion that monetary damages could not be assessed against the Defendant, this Court has the authority to strike the claim for monetary

damages and permit the case to proceed solely on the injunctive and equitable relief sought.

The Defendant takes the position that the Supreme Court decision in Monell overrules Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961) only insofar as Monroe had completely immunized municipalities from suit under Section 1983. Whether that analysis is correct or not, it should be noted that in the seventeen years during the existence of Monroe v. Pape and prior to the Monell decision, Monroe v. Pape was interpreted only as outlawing actions for monetary damages against states and municipal corporations. Adams v. Park Ridge, 293 F.2d 585 (7th Cir. 1961); United States v. Clark, 249 F.Supp. 720 (DC Ala. 1965).

Counsel for the Defendant have cited no cases to this Court and, in fact, none exist prohibiting injunctive relief against a state or one its agencies and to the contrary, in addition to the above cited authorities it is

quite clear that states are subject to suit for injunctive and declaratory relief. Gates v. Collier, 559 F.2d 241 (5th Cir. 1977). Therefore, this Court should deny Defendant's motion to dismiss and permit this cause to proceed to a determination of the merits.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF EUGENE P. SPELLMAN
Attorneys for Plaintiff, GEORGIA PATSY
100 North Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132

By /s/
DENIS DEAN, SR.

[CAPTION]

ORDER

THIS CAUSE came before the Court on Defendant's Motion to Dismiss the Complaint on substantive and procedural grounds. After due consideration, the Court finds the Complaint must be dismissed for its failure to join the proper Defendant to this action.

State law determines the capacity of an individual, corporation or other entity to sue and be sued. Rule 17(b), Fed. R. Civ. P. Florida Interational University is an institution which is part of the state university system. Fla. Stat. §239.01 (1977). The Board of Regents of the Division of Universities of the Department of Education is a corporate body with the power and capacity to sue and be sued. Fla. Stat. §240.042 (1977). No state university, in its individual capacity, is granted such power. "Under Florida law the University

is not endowed with the authority to be sued in its own name. Rather, these characteristics are bestowed upon the Board of Regents, as head of the State's University System." Byron v. University of Florida, 403 F. Supp. 49, 54 (N.D. Fla. 1975). Accordingly, the Court finds Florida International University not to be the proper party Defendant in this cause.

It is thereupon

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss be and the same is hereby GRANTED and it is further

ORDERED AND ADJUDGED that Plaintiff shall have TWENTY (20) days from the date of this Order in which to file with the Court an Amended Complaint.

DONE and ORDERED in Chambers at

F. Supp. 49, 54 (N.D. Fla. 1975). Accordingly, the Court finds Florida International University not to be the proper party Defendant in this cause.

It is thereupon

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss be and the same is hereby GRANTED and it is further

ORDERED AND ADJUDGED that Plaintiff shall have TWENTY (20) days from the date of this Order in which to file with the Court an Amended Complaint.

DONE and ORDERED in Chambers at Miami, Florida, this 9th day of April, 1979.

/s/
UNITED STATES DISTRICT COURT JUDGE

copies: Eugene P. Spellman, Esq.

Guy O. Farmer, II, Esq.
Jeffrey H. Klink, Esq.

Miami, Florida, this 9th day of April, 1979.

/s/
UNITED STATES DISTRICT COURT JUDGE

copies: Eugene P. Spellman, Esq.

Guy O. Farmer, II, Esq.
Jeffrey H. Klink, Esq.

[CAPTION]

AMENDED COMPLAINT

COMES NOW, GEORGIA PATSY, Plaintiff herein, by and through her undersigned counsel, complaining of the above Defendants and for cause of action would respectfully show unto the Court as follows:

I.

JURISDICTION

1. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) which provides for original jurisdiction of this Court in all actions authorized by 42 U.S.C. §1983 to redress the deprivation under color of law of any right, privilege or immunited secured by the Constitution of the United States, specifically the Fifth, Ninth, and Fourteenth Amendments.

II.

PRELIMINARY STATEMENT

2. GEORGIA PATSY, a white female American and an employee of the above captioned University, seeks redress for discrimination due to her race, suffered by her in violation of the Constitution and the laws of the United States. Specifically, Plaintiff alleges she has been denied employment opportunities for which she is well qualified within the above captioned University, while there has been an intentional and concerted effort by the University to promote and hire minorities to available positions for which Plaintiff has applied.

III.

PARTIES

3. GEORGIA PATSY, Plaintiff, is a citizen of the United States and a resident of the Southern District of Florida. Plaintiff is employed by FLORIDA INTERNATIONAL UNIVERSITY

and has attained permanent status within the personnel system of the State of Florida.

4. The Defendant, BOARD OF REGENTS, of the State of Florida is a corporate body, head of the State's University System, of which FLORIDA INTERNATIONAL UNIVERSITY is an institution part of that system.

IV.

STATEMENT OF CLAIM

5. On June 1st, 1972, Plaintiff began employment as a Clerk Typist III, with FLORIDA INTERNATIONAL UNIVERSITY and is presently classified as a Secretary III.

6. Plaintiff's education consists of a Bachelor of Education Degree (cum laude) from the University of Miami and a Master of Science Degree in Administration and Supervision of Adult Education from FLORIDA INTERNATIONAL UNIVERSITY. Plaintiff has had continuing teaching experience in the Dade County, Florida, Adult Education Program.

7. During the six (6) years while Plaintiff has been employed at FLORIDA INTERNATIONAL UNIVERSITY, she has applied for numerous employment openings within FLORIDA INTERNATIONAL UNIVERSITY and has been uniformly rejected with many Latins and non-whites having been selected in place of the Plaintiff.

8. The following is a partial list of available positions advertised by FLORIDA INTERNATIONAL UNIVERSITY for which Plaintiff applied for, but was rejected:

Position with Career Development and Placement Dept.

Interim Counselor in School Education

Liason Officer and Student Affairs Coordinator

Continuing Education Coordinator

Coordinator/Director Alumni Affairs

Vocational Counselor II

Personnel Aide

College Work-Study Coordinator

Conference Coordinator

University Public Functions Manager

Financial Aid Counselor

Student Affairs Coordinator

Admissions Counselor

9. The former President of FLORIDA INTERNATIONAL UNIVERSITY, Charles Perry, has recognized that Plaintiff's background qualifies her for a higher position than the Secretary III position then and now held. See Exhibit "A" attached hereto and made a part hereof.

10. The professional skill and management abilities of the Plaintiff have been recognized by the Head of the Department of Psychology at FLORIDA INTERNATIONAL UNIVERSITY. See Exhibit "B" attached hereto and made a part hereof.

11. The Performance Appraisal conducted annually in accordance with the State of Florida Personnel System shows the Plaintiff to be outstanding, not only with respect to her assigned tasks, but innovative, resourceful, efficient and functioning more as a Staff Assistant than

as a secretary. See Exhibit "C" (composite) attached hereto and made a part hereof.

11(a). FLORIDA INTERNATIONAL UNIVERSITY has engaged in employment practices which have discriminated against Plaintiff on the basis of her race and/or sex in the promotion of its employees.

12. FLORIDA INTERNATIONAL UNIVERSITY has maintained and continues to maintain a policy of preference to minority applicants for both available administrative and non-administrative positions which results in discrimination against the Plaintiff, a white-female, contrary to the Constitution and laws of the United States.

13. FLORIDA INTERNATIONAL UNIVERSITY has continually sought out individuals from minority groups to fill positions resulting in discrimination against the Plaintiff, contrary to the Constitution and laws of the United States. See Exhibits "D" and "E" attached hereto and made a part hereof.

14. FLORIDA INTERNATIONAL UNIVERSITY through its agents, deceived Plaintiff into believing that she was being considered for a position she applied for when in reality, Plaintiff's name had not submitted as one of the final candidates for the position of Interim Counselor. See Exhibit "F" (composite) attached hereto and made a part hereof.

15. FLORIDA INTERNATIONAL UNIVERSITY not only rejected Plaintiff for positions for which she was qualified and had applied, but rejected Plaintiff for a position for which she had not applied. See Exhibit "G" attached hereto and made a part hereof.

16. FLORIDA INTERNATIONAL UNIVERSITY as further evidence of its discriminatory policies maintains files on qualified applicants for positions by segregating them as follows: White, Black, Male and Female, contrary to Federal law and Equal Employment guidelines.

16(a). The acts and practices by FLORIDA INTERNATIONAL UNIVERSITY described in this complaint constitute a pattern and practice of resistance to the full enjoyment of the right to equal employment opportunities without distinction based on race and/or sex and such acts and practices are intended to deny the full exercise of rights secured by the Constitution and laws of the United States.

17. An actual controversy exists between the Plaintiff and FLORIDA INTERNATIONAL UNIVERSITY, in that Plaintiff contends that the actions of FLORIDA INTERNATIONAL UNIVERSITY are in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiff is in doubt as to her status and rights under the Constitution of the United States and seeks a declaration of the legal and constitutional rights of

the parties with respect to the subject matter of this action.

18. Plaintiff will continue to suffer immediate and irreparable injury, loss or damage unless this Court grants the injunctive relief sought. There is no plain, adequate or speedy remedy at law to redress these deprivations.

V.

CLAIMS FOR RELIEF

19. There exists between the parties an actual controversy as heretofore set out. The Plaintiff is suffering and is threatened with immediate and irreparable injury as a result of the actions of FLORIDA INTERNATIONAL UNIVERSITY as stated above. The Plaintiff has no plain nor adequate remedy at law to redress the wrongs and unlawful conduct complained of herein. FLORIDA INTERNATIONAL UNIVERSITY has severely damaged Plaintiff by

its discriminatory practices and has painfully stigmatized Plaintiff, and continues to do so. By the actions of FLORIDA INTERNATIONAL UNIVERSITY, Plaintiff has been discriminated against and denied due process of law in violation of her rights under the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. FLORIDA INTERNATIONAL UNIVERSITY has acted in violation of Title 42, U.S.C. §1983, to inflict said deprivations on the Plaintiff.

WHEREFORE, Plaintiff prays this Honorable Court to enter the following relief:

A. Assume jurisdiction of this cause;

B. Enter a final judgment pursuant to 28 U.S.C., §2201 and Rule 57, of the Florida Rules of Civil Procedure declaring that the Plaintiff has suffered from acts of discrimination at the hands of

the Defendants or its agents, contrary to the Due Process Clause of the Fourteenth Amendment;

C. Require Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of $500,000 as actual and exemplary damages;

D. Assess all costs against the Defendant and award the same to the Plaintiff;

E. Award attorney's fees to the Plaintiff;

F. That the Court order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination

complained of herein.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF
EUGENE P. SPELLMAN
Attorney for Plaintiff
100 North Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132

BY: /s/
DENIS DEAN, SR.

BY: /s/
EUGENE P. SPELLMAN

00044

October 30, 1972

Mr. D. Burke Kibler, III
Post Office Box 1772
Lakeland, Florida 33802

Dear Burke:

Thank you for your recent letter concerning the employment status of Mrs. John Patsy at Florida International. Our Personnel Department has advised me that Mrs. Patsy is being considered for the position of Secretary III in the Division of Health and Physical Education, Recreation and Athletics in the School of Education.

In the past she has been interviewed by the Dean of the Division of Special Programs and the Director of Financial Aid. Unfortunately, there are just not any counselor positions available. We realize Mrs. Patsy's background qualifies her for a higher position than the clerk typist position she now holds. However, as the situation stands the Secretary III position is the highest one we have to offer.

Thank you for your interest—and best wishes.

Sincerely,

Charles E. Perry
President

CP/jm
bcc: Personnel Department with file

EXHIBIT A

FLORIDA INTERNATIONAL UNIVERSITY

MEMORANDUM

TO: Mrs. Georgia Patsy *DATE:* June 21, 1977

FROM: Dr. Ronald S. Tikofsky

SUBJECT: CONTRIBUTIONS TO THE DEPARTMENT OF PSYCHOLOGY

It goes without saying, from my point of view, that your presence in the Department as my Secretary and Office Manager have created what I believe to be an outstanding professional attitude within the office staff. I have worked with many secretaries over the years but never have I been so pleased and proud to be able to recognize formally the contribution of someone like yourself. You have really taken charge and set a tone and atmosphere that is absolutely outstanding. Your professional competence, personal skills, and management abilities have impressed me greatly. More work is being done in the Department than has ever been done before, it is being done better, and with more professionalism than before. You have created an esprit de corps among the other members of the secretarial staff that is going a long ways to keeping our Department highly efficient in the face of all sorts of pressures and demands.

Your ability to handle pressure situations, keeping me and other members of the faculty in tow when necessary, and dealing with administrative matters within the University that relate to the Department, in a cool and proficient way with a sense of humor, has made a significant contribution to the well being of the Department. It gives me great pleasure to be able to take this opportunity to recognize in a formal way your outstanding contributions to the Department and in particular for your work directly related to my activities. I wish there were some way that I could more properly recognize the contributions you and other members of the secretarial staff have made to all of us in the Department.

cc: Dean Arthur Herriott, College of Arts & Sciences
Mrs. Patricia Caruso, Director of Personnel

(Inter–office Communication)

EXHIBIT B

FLORIDA INTERNATIONAL UNIVERSITY
PERFORMANCE APPRAISAL

00046

Name Patsy, Georgia D. Social Security No. 232-64-1699

Department Psychology Classification Title Secretary OPS

Type of Appraisal: ☐ Probationary ☐ Anniversary ☑ Special

Period of Evaluation: From: 8-1-77 To: 8-1-78

NOTE: This form is to be completed by the rating supervisor and reviewed with the employee for overall appraisal of performance and mutual agreement (including in the spaces provided). The original must be returned to Personnel Services, the second copy retained in the department and the third copy given to the employee. (See reverse side for more detailed instructions.)

1. JOB KNOWLEDGE (Understanding of all phases of job, including use of methods, techniques, tools and materials, for safe and satisfactory performance)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Has full command of job requirements for her own position as well as other Career Service staff. Thoroughly understands the University System and uses this knowledge to maximize her understanding of her position.

2. QUALITY (Accuracy, completeness) -

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Work is always done with exceptional accuracy. Catches and corrects syntactic and spelling errors in rough drafts without having to be told to do so.

3. QUANTITY (Productivity, volume)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Mrs. Patsy always hears deadlines in spite of a very heavy and diverse workload. She produces a high volume of work with a very short turn-around time.

4. DEPENDABILITY (Reliable, trustworthy, regular in attendance)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Completely reliable, requires no supervision.

5. ORGANIZATION (Consider delegation of assignments, directing work flow and following up on results.)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Exceptionally systematic organizer. Makes maximum use of time with high levels of effectiveness.

6. INITIATIVE (Desire to work, attain, and achieve goals; seeks additional responsibility)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Complete self-starter, dedicated to her job, always trying to come up with new ways to improve office routines and increase efficiency and productivity. Accepts responsibility voluntarily.

WHITE-Personnel Services - CANARY-Evaluator's Copy - PINK-Employee Copy

EXHIBIT C

00047

7. SUPERVISORY ABILITY (Effectiveness in directing activities of others, including verbal and written communication, results, relations and complaints, and commitment to take action) Use only when rating a supervisor.

- ☐ Outstanding
- ☐ Above Satisfactory
- ☐ Satisfactory
- ☐ Conditional
- ☐ Unsatisfactory
- ☐ Not Applicable

Justification: _____

OVERALL EVALUATION (Considering total performance, how well employee performed)

- ☑ Outstanding
- ☐ Above Satisfactory
- ☐ Satisfactory
- ☐ Conditional
- ☐ Unsatisfactory

Justification: Mrs. Patsy is by far and away the most professional and best secretary I have had working with me since coming to FIU in 1971. She is truly a professional. In fact, she functions more as my staff assistant than as a secretary. She exceeds the performance standards for the position she holds in the department.

Employee's comments and views on the preceding statements:

Use attachments, if necessary.

Signature of Employee: _____ Date: _____
(Does not imply concurrence with supervisor's evaluation, only that evaluation was made and reviewed by employee.)

Signature of Immediate Supervisor: _____ Date: _____

Signature of Second-Level Supervisor or Dept. Head _____ Date: _____

The employee was informed of his/her progress on the following dates:

_____ _____ _____ _____

Supervisor and employee should indicate agreement of dates by initialing.

00048

FLO[illegible]DA INTERNATIONAL UNIVERSI[illegible]
PERFORMANCE APPRAISAL

Name [illegible] Social Security No. [illegible]

Department: Psychology Dept. Classification Title: [illegible]

Type of Appraisal: ☐ Probationary ☐ Anniversary ☐ Special

Period of Evaluation: From: 7/1/77 To: 3/1/77

NOTE: This form is to be completed by the immediate supervisor and reviewed with the employee by checking appropriate level of performance and making appropriate comments in the space provided. The original must be returned to Personnel Services, one copied copy retained in the department, and the third copy given to the employee. (See reverse side for more detailed instructions.)

1. JOB KNOWLEDGE (Understanding of all phases of job, including use of methods, techniques, tools and materials, for safe and satisfactory performance)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: [illegible]

2. QUALITY (Accuracy, completeness)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: The typing is frequently error free. Occasionally some copy such as dashes and ellipses [illegible] All of Mrs. Patsy's work meets acceptable standards of quality.

3. QUANTITY (Productivity, volume)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: The amount of work Patsy is [illegible] normally expected of a person in this position. All dictation unless other time is given is done the same day. Mrs. Patsy is always ahead of me in getting work done.

4. DEPENDABILITY (Reliable, trustworthy, regular in attendance)

☐ Outstanding
☐ Above Satisfactory
☒ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: [illegible]

5. ORGANIZATION (Considers delegation of assignments, directing work flow and following up on results)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: In the short time she has been with the dept. Mrs. [illegible] done a tremendous job on [illegible] coordination, and [illegible] efficiency and morale of office staff and faculty.

6. INITIATIVE (Desire to work, attain, and achieve goals; seeks additional responsibility)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Mrs. Patsy doesn't wait to be told what to do. She recognizes what has to be done and proceeds to see [illegible] She has had a high [illegible] of [illegible] and varied routines. She offers [illegible] library and maintains [illegible] personality.

WHITE-Personnel Services - CANARY-Evaluator's Copy - PINK-Employee Copy

00049

7. SUPERVISORY ABILITY (Ability in directing activities of others, including verbal and written communication, resolving grievances and complaints, and commitment to affirmative action. Use only when rating a supervisor.

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: _____

OVERALL EVALUATION (Considering total performance, how well employee performed)

☐ Outstanding
☒ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory

Justification: Mrs. Patay's performance has exceeded my expectations of her capabilities. She is a hard worker who manages high standards of performance on her work and demands excellence of herself. I am certain that as she becomes more familiar with the processes & procedures, will show further development.

Employee's comments and views on the preceding assessment

Use attachments, if necessary.

Signature of Employee _____ Date: 5-1-77

(Does not imply concurrence with supervisor's evaluation, only that evaluation was made and reviewed by employee.)

Signature of Immediate Supervisor _____ Date: 5-1-77

Signature of Second-Level Supervisor or Dept. Head _____ Date: 5-1-77

00050

PERFORMANCE APPRAISAL SYSTEM

CAREER SERVICE EMPLOYEES

I POLICY — "A philosophy and appraisal system that recognizes and encourages performance not only provides the stimulus to improve and develop but also results in superior performance in the long run."[1] It is important, therefore, that our University envision and understand sound principles of performance appraisal administration which can be applied effectively on a department basis to facilitate: (A) Building of better understanding between the employee and the administration. (B) Classification of actual goals of the employee, the employee's supervisor, and the University. (C) Information the employee of current and past reports in the performance of work assignments as well as evaluation of goals and objectives. (D) Determining the employee's potential for promotion. (E) Determining the employee's eligibility for merit salary advancements. (F) Instituting disciplinary actions when required.

II AUTHORITY — In accordance with Chapter 22-6.0 of the Personnel Rules and Regulations of the Career Service System, State of Florida, each employee shall receive a performance appraisal by his immediate supervisor and all ratings shall be reviewed and approved by the next higher level administrator. In all cases, the supervisor doing the rating must be familiar with the performance of the employee during the rated portion of the rating period.

III PROCEDURE FOR INITIATING AND COMPLETING PERFORMANCE APPRAISALS — (A) The Personnel Officer will notify the administrative head of required employee appraisals approximately thirty (30) days before they are due by forwarding copies of the appraisal form indicating the name of the employee, his assignment, and anniversary or promotion date. (B) Receipt of the form should be considered notice to the administrative head that the employee is to have an appraisal and should be assigned to the appropriate supervisor in charge. (C) The immediate supervisor will evaluate the performance of the employee by completing the performance appraisal form considering the criteria for the position to which the incumbent of the class is assigned. (D) After evaluating the employee's performance, the supervisor shall submit the appraisal form to his own administrative for approval. In no case shall both actions be performed by the same person. (E) After the completed appraisal form has been approved by the next level of supervision, the immediate supervisor shall discuss the review with the employee. At this point, the primary objective should be: 1. Communicating the appraisal in order to justify decisions. 2. Attempting to reinforce improved performance, and. 3. Informing the employee exactly where he/she stands in the eye of supervision. (F) Any performance rating of either than "Satisfactory" must be explained in detail on the rating form or in an attached statement. (G) The employee should sign each appraisal form which is prepared and discussed with him/her, however, this is not mandatory. In the event the employee does not wish to sign the appraisal form, it shall be placed in the employee's personnel file with a notation that the employee refused to sign the evaluation. (H) A copy of the completed appraisal form will be provided to the employee upon request. (I) The completed appraisal form should be returned to the Personnel Office as soon as the appraisal has been discussed. The appraisal form will then be placed in the employee's permanent record file and will be available to the employee's supervisor for future reference at his discretion.

IV THE APPRAISAL FORM — (A) THE RATING SCALE consists of five numbers and terms to be applied to each factor rated and to the overall evaluation. The terms which make up the scale are: 1. Unsatisfactory - the employee's performance is not acceptable. Serious failed consistently to meet the minimum requirements for the position. 2. Conditional - the employee's performance is marginal. The employee has failed seriously to maintain the minimum performance requirements, but shows a potential for improvement. 3. Satisfactory - the employee's performance is completely acceptable in all job requirements. 4. Above Satisfactory - the employee's performance has far exceeded the minimum requirements for the position. 5. Outstanding - the employee's performance appears to approach by any significant extent. The employee is considered totally competent in all respects.

(B) THE RATINGS - The shall be entered on the appraisal - to and shall be determined on the basis of total rating factors. (C) RATING FACTORS - The Performance Appraisal Form includes an assessment - being factors: 1. Under - Level of Job - is the overall evaluation of this factor, based the employee's knowledge, attitude and conduct when in an official manner compared to a standard which meets the approval of the immediate supervisor, division director or administrative head. 2. and 3. Quality and Quantity of Work - mandatory evaluation. Satisfactory, Outstanding and effectiveness of the volume of work performed that is required by the employee's control. For example, a typist may be said to type twenty letters a day, but if the employee's supervisor only types two that letters, the volume is beyond the employee's control. 4. Responsibility - considered procedure and job knowledge required and/or performance in carrying assignments. The employee's attention to blunders in the accuracy of direct and indirect communication to consider importance of this factor. 5. Personal Relations - consistent collection of satisfactory, situation work flow and follow-ing up on records. 6. Dependability - considered responsibilities, call-in-sick, willingness to correct and to carry out responsibility, and the responsibility of the employee to work assignments. 7. Supervisory Ability[2] - to the employee when rating supervisory duty. In the overall evaluation of this factor, consider the employee's ability to organize, plan, train, discipline, delegate and control the work of his subordinates in an orderly and efficient manner. In addition, need to set an example for his employees by supporting and requiring high standards of performance, safety, sound decisions and leadership. Provides guidance and coordination in disciplinary control and in evaluating and improving performance levels of his employee.

V PERIOD OF APPRAISAL — (A) Probationary Appraisal - each Career Service employee should be appraised by his/her immediate supervisor at least two to four weeks prior to the date ending the probationary period (six months continuous and creditable service from the date of initial employment or promotion). (B) Anniversary Appraisal - each employee's performance will be appraised by his/her immediate supervisor at least thirty (30) days prior to the employee's anniversary date. An employee's anniversary date shall be established twelve (12) calendar months to the date following initial employment or promotion, except that: 1. An employee who is granted leave of absence without pay in excess of five work days during any pay period, or educational leave with pay, will have the anniversary date advanced one calendar day for each day or work leave. 2. An employee who has received a "Conditional" or "Unsatisfactory" performance appraisal, as discussed in Section IV (A), shall have the anniversary date advanced one calendar day for each calendar day such rating is in effect. 3. An employee who is demoted prior to receiving permanent status, in any class, shall have the anniversary date re-established twelve (12) calendar months to the date from the date of demotion. (C) Special Appraisal - reviews for the purpose of reconsidering performance other than "Satisfactory" may be made at any time and shall not change the anniversary date. (D) Satisfactory Appraisal - ratings of "Conditional" and "Unsatisfactory" require subsequent review every sixty (60) days until: 1. The employee's performance has improved and is evaluated at least "Satisfactory"; or 2. His service have elapsed without the employee receiving a rating of at least "Satisfactory". In both cases, the employee should be removed from the classification.

"Supervisory is defined as any employee, who on a day-to-day basis, directs the work of one or more employees/employees, and has authority to employ or discharge employees, or has recommendations are given particular weight.

[1] Edwin B. Flippo, Principles of Personnel Management, McGraw-Hill Publishing Company, New York, New York, 1966, p. 367.

00051

FLORIDA INTERNATIONAL UNIVERSITY

PERFORMANCE APPRAISAL (CAREER SERVICE EMPLOYEES)

NAME: Patsy Georgia SOCIAL SECURITY NO. 232-54-1695 EMPLOYMENT DATE: 6-1-73

COLLEGE/DIVISION: Physical Education CLASSIFICATION: Secretary III

☐ 6-MONTH EVALUATION ☐ ANNIVERSARY DATE EVALUATION PERIOD COVERED BY THIS REVIEW---From 1-10-76 To

RATING INSTRUCTIONS: 1. Non-supervisory employee - rate only factors 1-4. 2. Supervisory employee - rate all factors 1-5.

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System for Career Service employees as reproduced on the reverse side of this form.

FACTOR	UNSATISFACTORY	CONDITIONAL	SATISFACTORY	ABOVE SATISFACTORY	OUTSTANDING
	1	2 3	4 5 6 7	8 9	10
(1) Knowledge of Job	Has not gained adequate comprehension of job.	Insufficient knowledge of some phase of job.	Adequate knowledge of all phases of job.	Thorough knowledge of all phases of job. Organizes and arranges work efficiently.	Has complete comprehension of job and often makes suggestions to improve efficiencies.
	1	2 3	4 5 6 7	8 9	10
(2) Quality & Quantity of Work	Does not meet acceptable minimum requirements.	Works slowly. Accurately produces only enough to get by.	Regularly accomplishes accurate, complete work in allotted time.	Works rapidly producing consistently error free work in excess of regular requirements.	Has exceptionally accurate and complete expertise of job.
	1	2 3	4 5 6 7	8 9	10
(3) Dependability	Regularly late and often absent. With constant supervision seldom finishes assigned tasks.	Frequently late and absent. Must be regularly prodded to accomplish assigned tasks.	Usually reports at scheduled times. Completes duly performance standards.	Seldom late or absent. Works well in the absence of direct supervision	Extremely good attendance record. Works uncommonly often outside of normal hours.
	1	2 3	4 5 6 7	8 9	10
(4) Initiative	Shows no interest in job.	Frequently appears indifferent and unwilling to accept responsibility.	Shows interest in job and willing to accept responsibility.	Gets interested in job and from time to time responsibilities.	Extremely self-motivating and resourceful. Consistently searches for ways to improve efficiencies of self and job.
	1	2 3	4 5 6 7	8 9	10
(5) Supervisory Ability (Use only when rating a supervisor)	Regularly demonstrates deficient organization, planning, and leadership abilities. Work results of subordinates frequently unsuccessful.	Frequently demonstrates inadequate organization, planning and leadership abilities. Work results of subordinates below par at times.	Consistently demonstrates standard organization, planning and leadership skills. Obtains acceptable results from subordinates.	Demonstrates exceptional abilities in organization, planning and leadership ability. Frequently obtains high standards of performance from his subordinates.	Has a high qualities in organization, planning, and leadership ability. Consistently obtains maximum performance from his subordinates.

	Non-Supervisory	Supervisory
Unsatisfactory	4 - 7	5 - 8
Conditional	8 - 15	9 - 18
Satisfactory	16 - 31	19 - 38
Above Satisfactory	32 - 36	39 - 45
Outstanding	37 - 40	46 - 50

Total Appraisal: 40

Rated by: [signature] Date: 6-24-76

Approved by: [signature] Date: 6-25-76

Employee's Signature: (Indicate reason for not signing) Date: 6-24-76

RATER'S JUSTIFICATION: (Required for any non-supervisory total less than 16 or more than 37 and supervisory total less than 19 or more than 38 with examples as to why and how this employee is performing either above or below the satisfactory norm.)

(See ATTACHED)

EMPLOYEE'S COMMENTS:

(Add additional sheets if necessary)

CONFIDENTIAL - ONCE COMPLETED, ASSIGNED COPY TO EMPLOYEE, OTHER COPY

Best Copy Available

00052

FLORIDA INTERNATIONAL UNIVERSITY

PERFORMANCE APPRAISAL (CAREER SERVICE EMPLOYEES)

NAME: Patsy, Georgia SOCIAL SECURITY NO. 232-54-1695 EMPLOYMENT DATE: 6-1-72

COLLEGE/DIVISION: Physical Education CLASSIFICATION: Secretary III

☐ 6-MONTH EVALUATION ☒ ANNIVERSARY DATE EVALUATION PERIOD COVERED BY THIS REVIEW---From 11-10-74 To 11-10-75

RATING INSTRUCTIONS: 1. Non-supervisory employee - rate only Factors 1-4. 2. Supervisory employee - rate all Factors 1-5.

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System for Career Service employees as reproduced on the reverse side of this form.

FACTOR	UNSATISFACTORY	CONDITIONAL	SATISFACTORY	ABOVE SATISFACTORY	OUTSTANDING
(1) Knowledge of Job	1 Has not gained adequate comprehension of job.	2 3 Insufficient knowledge of some phase of job.	4 5 6 7 Adequate knowledge of all phases of job.	8 9 Thorough knowledge of all phases of job. Organizes and arranges work efficiently.	(10) Has complete comprehension of job and often makes suggestions to improve efficiencies.
(2) Quality & Quantity of Work	1 Does not meet acceptable minimum requirements.	2 3 Works slowly. Accurately produces only enough to get by.	4 5 6 7 Regularly accomplishes accurate, complete work in allotted time.	8 9 Works rapidly producing consistently error free work in excess of regular assignments.	(10) Has exceptionally accurate and complete knowledge of job.
(3) Dependability	1 Regularly late and often absent. With constant supervision seldom finishes assigned tasks.	2 3 Frequently late and absent. Must be regularly prodded to accomplish assigned tasks.	4 5 6 7 Usually present at scheduled times. Requires only periodic checking. Meets deadlines.	8 9 Seldom late or absent. Works well in the absence of direct supervision.	(10) Extremely good attendance record. Works independently often exhibits effort beyond what is expected.
(4) Initiative	1 Shows no interest in job.	2 3 Frequently appears indifferent and unwilling to accept responsibility.	4 5 6 7 Shows interest in job and willing to accept responsibility.	8 9 Very interested in job and often seeks new responsibilities.	10 Extremely self-motivating and resourceful. Consistently searches for ways to improve efficiencies of self and job.
(5) Supervisory Ability (Use only when rating a supervisor)	1 Regularly demonstrates deficient organization, planning, and leadership abilities. Work results of subordinates frequently unsuccessful.	2 3 Frequently demonstrates inadequate organization, planning and leadership abilities. Work results of subordinates below par at times.	4 5 6 7 Consistently demonstrates standard organization, planning and leadership skills. Obtains acceptable results from subordinates.	8 9 Demonstrates excellent qualities in organization, planning and leadership ability. Frequently exceeds high standards of performance from his subordinates.	10 Has superior qualities in organization, planning, and leadership ability. Consistently obtains maximum performance from his subordinates.

	Non-Supervisory	Supervisory
Unsatisfactory	4 - 7	5 - 8
Conditional	8 - 11	9 - 12
Satisfactory	12 - 33	13 - 38
Above Satisfactory	34 - 36	39 - 45
Outstanding	37 - 40	46 - 50

Total Appraisal: 40

Rater: [signature] Date: 10/27/75

Approved: [signature] Date: 10/27/75

Employee's Signature: [signature] Date: 10/27/75

RATER'S JUSTIFICATION: (Required for any non-supervisory score less than 34 or more than 37 and supervisory score less than 39 or more than 43 with examples as to why and how this employee is performing either above or below the satisfactory norm.)

Mrs. Georgia Patsy has been superior in all aspects of her position responsibilities during this past year. She is an extremely knowledgeable person with the capability of handling many tasks over and above what might traditionally be considered clerical. She is punctual, hard working, and

EMPLOYEE'S COMMENTS: professional in every respect. Her opinion is highly valued and those who work with her constantly seek advice. She has always placed the business and image of the division above all other considerations.

(add additional sheets if necessary)

CONFIDENTIAL - ONCE COMPLETED, AVAILABLE ONLY TO PERSONS SHOWING NEED CAUSE

00053

FIU - DA INTERNATIONAL UNIVERSITY --

PERFORMANCE APPRAISAL

Career Service Employee

Name: Patsy, Georgia P. Classification: Clerk Typist III

College/Division: Physical Education Social Security Number: [redacted]

Employment Date: 6-1-72 Purpose: Annual/Anniversary Date Evaluation

Period Covered by this Review: From 11-10-73 To 11-10-74

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System and Uniform Pay Plan for Career Service Employees.

Rate each factor by circling the numerical value	Outstanding	Above Satisfactory	Satisfactory	Conditional	Unsatisfactory
Appearance	XXXXX	(3)	2	1	0
Attendance	XXXXX	(3)	2	1	0
Knowledge of Job	(4)	3	2	1	0
Quality of Work	(4)	3	2	1	0
Quantity of Work	(4)	3	2	1	0
Initiative	(4)	3	2	1	0
Dependability	(4)	3	2	1	0
Attitude	(4)	3	2	1	0
Relationship with Others	(4)	3	2	1	0

Outstanding	32 and above
Above Satisfactory	24 thru 31
Satisfactory	16 thru 23
Conditional	9 thru 15
Below Satisfactory	0 thru 8

Total Score 34

Rated By: [signature] Date 9/26/74

Approved by Administrative Head/Dean/Director: [signature] Date Oct. 2 '74

Employee's Signature: _____ Date _____

RATER'S JUSTIFICATION: (Required for any score less than 16 or more than 23, with examples as to why and how this employee is performing either above or below the satisfactory norm.)

Mrs. Patsy has again proven to be an outstanding secretary during this past year. She does not need to be told what to do, she is organized, her work is very good, and she puts a great deal of extra time into her job. She has handled her Division responsibilities well and she gets along with everyone. She is always able to do the little extra things that make life around the office a little easier on everyone.

CONFIDENTIAL - ONCE COMPLETED, AVAILABLE ONLY TO PERSONS SHOWING GOOD CAUSE

00054

FT IDA INTERNATIONAL UNIVERSITY

PERFORMANCE APPRAISAL

Career Service Employees

Name Patsy Vicroy Classification Sec. III

College/Division Phys. Ed. Social Security Number ___-___-____

Employment Date: 11.10.72 Purpose: 6 Mo. Evaluation/Anniversary Date Evaluation

Period Covered by this Review: From 5.10.73 To 11.10.73

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System and Uniform Pay Plan for Career Service Employees.

Rate each factor by circling the numerical value

	Outstanding	Above Satisfactory	Satisfactory	Conditional	Unsatisfactory
Appearance	XXXXX	(3)	2	1	0
Attendance	XXXXX	(3)	2	1	0
Knowledge of Job	(4)	3	2	1	0
Quality of Work	(4)	3	2	1	0
Quantity of Work	(4)	3	2	1	0
Initiative	(4)	3	2	1	0
Dependability	(4)	3	2	1	0
Attitude	(4)	3	2	1	0
Relationship with Others	4	(3)	2	1	0

Outstanding	32 and above
Above Satisfactory	24 thru 31
Satisfactory	16 thru 23
Conditional	9 thru 15
Below Satisfactory	0 thru 8

Total Score 33

Rated By: [signature illegible] Date 11/6/73

Approved by Administrative Head/Dean/Director: [signature illegible] Date 11/6/73

Employee's Signature: [signature illegible] Date 11.6.73

RATER'S JUSTIFICATION: (Required for any score less than 16 or more than 33, with examples as to why and how this employee is performing either above or below the satisfactory norm.)

Mrs. Vicroy is an extremely reliable employee. She works well with others, excellent quality & best of all she is always very cheerful. She is a good hostess & she will work at other functions.

CONFIDENTIAL - ONCE COMPLETED, AVAILABLE ONLY TO PERSONS SHOWING GOOD CAUSE

TO: Dean Sowards

00055

PERFORMANCE APPRAISAL

Career Service Employees

Name Patsy, Georgia D. Classification Secretary III

College/Division Physical Education Social Security Number 232-54-1695

Employment Date: 11/10/72 Purpose: 6 Mo. Evaluation

Period Covered by this Review: From 11/10/72 To 5/10/73

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System and Uniform Pay Plan for Career Service Employees.

Rate each factor by circling the numerical value	Outstanding	Above Satisfactory	Satisfactory	Conditional	Unsatisfactory
Appearance	XXXXX	(3)	2	1	0
Attendance	XXXXX	(3)	2	1	0
Knowledge of Job	(4)	3	2	1	0
Quality of Work	(4)	3	2	1	0
Quantity of Work	(4)	3	2	1	0
Initiative	(4)	3	2	1	0
Dependability	(4)	3	2	1	0
Attitude	(4)	3	2	1	0
Relationship with Others	(4)	3	2	1	0

Outstanding	32 and above
Above Satisfactory	24 thru 31
Satisfactory	16 thru 23
Conditional	9 thru 15
Below Satisfactory	0 thru 8

Total Score 34

Rated By: [signature] Date 4/16/73

Approved by Administrative Head/Dean/Director: [signature] Date 4/17/73

Employee's Signature: [signature] Date 4-18-73

RATER'S JUSTIFICATION: (Required for any score less than 16 or more than 23, with examples as to why and how this employee is performing either above or below the Satisfactory norm.)

CONFIDENTIAL - ONCE COMPLETED, AVAILABLE ONLY TO PERSONS SHOWING GOOD CAUSE

00056

INDIANA UNIVERSITY
School of Health, Physical Education, and Recreation
HPER BUILDING
BLOOMINGTON, INDIANA 47401

PHYSICAL EDUCATION FOR MEN

AREA CODE 812 337-1844
TEL. NO.

April 17, 1973

Black

Dr. Paul E. Hartman
Chairman
Division of Health, Physical
Education and Recreation
Florida International University
Tamiami Trail
Miami, Florida 33144

Dear Dr. Hartman:

In reply to your letter in which you are seeking individuals in the area of Health Education, I wish to suggest the name of Miss Vesta Massey, who is beyond her Master's degree in Health Education. Vesta is a young Black lady who is also very knowledgeable in the area of Movement Education and Modern Dance.

Since you have indicated Blacks and Latins, I have no other people to suggest at the present time, but will present their names for consideration if I find them in my travels around the country.

I hope that we can be of service to you.

Very truly yours,

John Bronsecum
Coordinator of Placement

JB:jes

Called 4-23-73 4:00 p.m.
Credentials to be sent
Mrs. May to call 4-24-73
Called Hartman 4-25-73 4:15
Mr. May to call back

EXHIBIT D

8 8 61

00057

FLORIDA INTERNATIONAL UNIVERSITY

MEMORANDUM

TO: Dr. Glenn A. Goerke DATE: July 9, 1973

FROM: Charles E. Perry

SUBJECT: Wrestling Coach

Just a reminder to you and to Dr. Hartman that none of the head coaches are to be appointed without being interviewed and approved by me. I assume that this will be done in regard to the wrestling coach.

It is my understanding that there is an outstanding Black wrestling coach at Miami-Dade South who is a graduate of Florida A&M and has a Masters degree from someplace. I further understand that he has had a great interest in the wrestling job here at Florida International. It would seem to me that we should look very carefully at this young man, because having a head coach who knows the local wrestling situation (and who is Black) would be a great advantage to the University.

Thank you.

cc: Dr. Paul Hartman
CEP/mam

EXHIBIT E

4 1 62

00058

FLORIDA INTERNATIONAL UNIVERSITY

MEMORANDUM

TO: Dr. Judy Blucher, Associate Professor, Division of HPER
DATE: October 22, 1976
FROM: Mrs. Georgia Petsy
SUBJECT: INTERIM COUNSELOR POSITION IN THE SCHOOL OF EDUCATION

On October 6, 1976, a resume for the position interim counselor in the School of Education was submitted for your review by Mrs. Georgia Petsy through the office of Dr. Paul Gallagher, Associate Dean, School of Education. Information is being solicited as to the date the resume was reviewed by you and your reactions to the qualifications of the applicant and also to the letters of recommendation which accompanied the resume. It should be noted that Mrs. Petsy has been an employee of FIU since June, 1972, and has been the Division Secretary in the Division of HPER since November 13, 1972. As a courtesy to a School of Education employee, it is requested that you respond to this request for information on the bottom section of this memorandum. Your cooperation will be appreciated.

Georgia -
My reactions were to list you among the top three candidates based upon written resumes that I reviewed for all candidates. I have heard nothing else about the position.

Sincerely,
Judy Blucher

(INTER-OFFICE COMMUNICATION)

(11-25-76)

EXHIBIT F

8 63

00059

Paul Gallagher Oct. 5, 1976

Judy Blucker

Candidates for Counseling Position

My ranking of the candidates after review of their resumes are as follows:

		Comments
1.	John E. Taylor	Experienced in counseling and other self-initiated administrative responsibilities
Tie 2.	Margaret Culley	Same as above plus teaching experience
Tie 2.	Carol Cooper	Same as above plus social work experience
4.	Joanna Albert	Training in Counseling; some experience
5.	Barbara Bader	Experience in working with teacher education students
6.	Joseph W. Wesley	Education training in Counseling; little or no experience (actual experience)
7.	James McKinney	Educational background; little experience

00060

FLORIDA INTERNATIONAL UNIVERSITY
TAMIAMI TRAIL • MIAMI, FLORIDA 33199 • (305) 552-2181

ADMINISTRATIVE AFFAIRS
OFFICE OF PERSONNEL SERVICES

August 11, 1978

Ms. Georgia Patsy
8325 S. W. 151 Street
Miami, Florida 33158

Dear Ms. Patsy:

I would like to express our appreciation for your interest in the Admissions Counselor position that was recently available in the Registrar's Office. The selection process was difficult and competitive. This is to notify you that the position was filled by another applicant. Since you are a qualified applicant, we would like to keep your application active for consideration in future openings.

As you know, all staff and administrative/professional position vacancies at the University are posted in our Personnel Office on both campuses as well as being listed in the weekly editions of the Blue Bulletin. An additional source of information on employment opportunities is the State of Florida Department of Education's Position Vacancy Listing, which is also posted in Personnel. This listing is published on a weekly basis and includes details on all faculty, administrative/professional and Career Service time card-exempt position vacancies that are available within the State University System and the Community College System. You may now call JIL ... (Our Job Information Line) to inquire about current vacancies at the University. By calling 552-2500, you will receive recorded information regarding current vacancies and their respective salaries, minimum requirements and application deadline dates.

It has always been a policy at Florida International University to encourage employees to seek opportunities within the University. Please be assured that we will be glad to assist you in any way possible should you have any further inquiries.

Sincerely,

Susan Pyle

Susan Pyle,
Personnel Services

SP:fc

THE STATE UNIVERSITY SYSTEM OF FLORIDA
EQUAL OPPORTUNITY EMPLOYER

EXHIBIT G

[CAPTION]

DEFENDANT'S MOTIONS TO
DISMISS THE AMENDED COMPLAINT

Pursuant to Rule 12(b), Federal Rules of Civil Procedure, the defendant, Florida Board of Regents ("BOR"), respectfully moves this Honorable Court to dismiss the amended complaint against it for the following reasons:

1. The Court lacks subject matter jurisdiction because the defendant is not a "person" under 42 U.S.C. § 1983 and because the plaintiff has failed to exhaust her administrative remedies.

2. The amended complaint fails to state a claim upon which relief can be granted.

DEFENDANT'S ALTERNATIVE MOTION
FOR A MORE DEFINITE STATEMENT

Should this Court deny the BOR's dismissal motions, then pursuant to Rule 12(e), F.R.Civ.P., the BOR respectfully

moves this Court to order Plaintiff to render a more definite statement of her claim.

WHEREFORE, the BOR respectfully requests this Court to dismiss the amended complaint with prejudice and award the BOR a reasonable attorneys' fee. Alternatively, the BOR respectfully requests a more definite statement of plaintiff's claims.

Respectfully submitted,

GUY O. FARMER II
JEFFREY H. KLINK
Mahoney, Hadlow & Adams
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

JOHN W. KOZYAK
Mahoney, Hadlow & Adams
1401 First Federal Building
One Southeast 3rd Avenue
Miami, Florida 33131
(305) 358-5550

By /s/
Jeffrey H. Klink

[CAPTION]

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

INTRODUCTION

Plaintiff, a white female clerical employee at Florida International University ("FIU"), has now refiled her complaint against the Florida Board of Regents ("BOR"). Plaintiff contends that she has suffered "reverse (racial) discrimination" in violation of 42 U.S.C. § 1983 ("§ 1983") apparently because she has unsuccessfully applied for positions for which FIU has engaged in "an intentional and concerted effort" to fill with minority applicants (Latins and non-whites). (Complaint ¶¶ 2, 7, 8, 11(a), 12, 16(a)) Plaintiff also generally contends that she has suffered sex discrimination. (Complaint ¶¶ 11(a), 16(a)) The balance of plaintiff's "Statement of Claim" con-

cerns evidentiary matters dealing with her alleged qualifications and FIU's alleged record-keeping policies (Complaint ¶¶ 5, 6, 9, 10, 11, 16), FIU's efforts to fill vacancies which were apparently not sought by plaintiff (Complaint ¶¶ 13, 15), FIU's alleged "deceit" in failing to advise plaintiff correctly as to her status as a "finalist" in contention for a particular position. (Complaint ¶ 14). Based on these allegations, plaintiff makes several relief oriented statements and requests. (Complaint ¶ 17, 18, and 19).

For all the following reasons, this Court should dismiss the Amended Complaint because plaintiff's allegations fail to state a claim upon which relief can be granted and reveal the absence of subject matter jurisdiction.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE AMENDED COMPLAINT FOR LACK OF JURISDICTION BECAUSE:

A. The Board of Regents Is Not A "Person" Within The Meaning of 42 U.S.C. § 1983.

The courts have consistently held that states and their agencies are not "persons" within the meaning of § 1983. Vick v. Texas Employment Commission, 514 F.2d 734 (5th Cir. 1975); Cheramie v. Tucker, 493 F.2d 586 (5th Cir. 1974). This exclusion also encompasses state universities and their governing boards. Ingraham v. Wright, 525 F.2d 909, 912 (5th Cir. 1976), cert. denied, 421 U.S. 952, aff'd on other grounds, 430 U.S. 651 (1977); Blanton v. State University of New York, 489 F.2d 377, 382 (2nd Cir. 1973). Finally, the Fifth Circuit has made it quite clear that a defendant's status as a "person" under § 1983 does not vary

depending upon the relief sought. Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976)(en banc), vacated and rem. on other grounds, 57 L.Ed. 2d 1144 (1978). The recent U.S. Supreme Court decision of Monell v. Dept. of Social Services, 436 U.S. _____, 56 L.Ed. 2d 611 (1978) has not overruled these decisions with respect to the status of state agencies as "persons" under § 1983.

In Monell, the Supreme Court held that local governments, municipal corporations, and/or local independent school boards are "persons" subject to liability under § 1983. Id. at 635. The holding however only overruled Monroe v. Pape, 365 U.S. 167 (1967), insofar as it had completely immunized municipalities from suit under § 1983. Id. at 619. The Supreme Court explicitly noted that its decision did

not affect the status of governmental units which are considered part of the State for Eleventh Amendment purposes. Id. at 635 n. 54. The Fifth Circuit in Bogard v. Cook, 586 F.2d 399, 410 (5th Cir. 1978) recently affirmed this reading of Monell.

In sum, the BOR as a state agency lacks the status of a "person" within the meaning of § 1983. See Aldredge v. Turlington, TCA 78-0830, Order dated January 25, 1979 (N.D. Fla.)(A copy of this Order was attached to FIU's initial motions to dismiss.) Accordingly, this Court should dismiss the complaint against the BOR for lack of subject matter jurisdiction.

B. Plaintiff Has Failed To Exhaust Her Administrative Remedies

Unless an administrative remedy is inadequate or futile, federal courts generally should not involve themselves in civil rights disputes until such remedies have been exhausted. See generally, Gibson v. Berry Hill, 411 U.S. 564, 36 L.Ed. 2d 488 (1973); McKart v. United States, 395 U.S. 185, 23 L.Ed. 2d 194 (1969); Lane v. Wilson, 307 U.S. 268, 83 L.Ed. 1281 (1939); Penn v. Schlesinger, 497 F.2d 970 (5th Cir. 1974); Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969); Craycroft v. Ferral, 408 F.2d 587 (9th Cir. 1969).

One can find language in Supreme Court decisions which seems to imply that plaintiffs are not required to exhaust administrative remedies prior to filing suit to vindicate their civil rights.

See Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969). However, a close analysis of those cases, Id. at 567-569, and a review of later Supreme Court authority, see Gibson v. Berry Hill, supra, reveals that the Supreme Court has only condemned a "wooden application of the exhaustion doctrine in cases under the Civil Rights Act." Eisen v. Eastman, supra, 421 F.2d at 569. As Judge Friedly stated:

> Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate ... or where it is certainly or probably futile .... A quite different situation would be presented, for example, when a complaint alleged that a subordinate state officer had violated the plaintiff's Constitutional rights by acting because of bias ... and the state has provided for a speedy appeal to a higher administrative officer .... We shall need much clearer directions than the [Supreme] Court has yet

> given or, we believe, will give, before we hold that plaintiffs in such cases may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal jurisdiction.

Id. The Fifth Circuit has also required that administrative remedies be exhausted--particularly in school personnel and management problems where there is a governing board as in this case--in order to insure that the alleged grievances are "ripe for adjudication." For example, in Stevenson v. Board of Education of Wheeler County, Georgia, 426 F.2d 1154 (5th Cir. 1970), Judge Bell noted the Supreme Court cases which appear to dispense with the requirement of "exhaustion of administrative remedies" in civil rights actions, but held that exhaustion

was generally necessary to insure institutional finality:

> We do not take these [U.S. Supreme Court] cases to hold, however, that federal courts are to intervene in school personnel and management problems without requiring such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication.

426 F.2d at 1157. In the instant case, plaintiff's alleged grievances clearly lack this "institutional finality."

As a Career Service employee, Ms. Patsy has access to several administrative grievance procedures in the State University System. The administrative rules of the Department of Administration Career Service System, Division of Personnel pro-

vide that each Career Service employee or applicant shall be assured of an equal opportunity in all agency employment practices without regard to that person's "race, color, sex, religion, creed, national origin, political opinions or affiliations, or age" except as provided by law. Fla. Admin. Code, Chapter 22A-15.02(1). These rules also provide for a comprehensive complaint, review and appeal procedure for any Career Service employee or applicant who feels he or she has been aggrieved with respect to equal employment opportunity. Id., Chapter 22A-15.05. The Department of Administration also requires each agency to establish written procedures for handling grievances of Career Service employees. Id., Chapter 22A-10.04. As a result of this requirement, the administrative rules of the Department of

Education, Florida International University provide a comprehensive method of handling the grievances of its Career Service employees. Id., Chapter 6C8-4.05. Under these rules, Ms. Patsy could have initiated an adequate and readily available grievance procedure after the denial of any of her applications. Id., Chapter 6C8-4.05(2)(a).

Finally, the BOR has the responsibility of managing and regulating the State University System, Fla. Stat. §§ 20.15, 239.01, 240.001 and 240.042, including its inherent power (through the Chancellor) to implement the University System's non-discrimination and equal employment oportunity. Moreover, the administrative rules of the BOR provide that university presidents and "any other personnel employed in the State University System" shall have

access to the BOR through its Chancellor Florida Admin. Code, Chapter 6C-4.01(6). Thus, plaintiff had this additional avenue of administrative relief available to her.

In sum, if plaintiff was a victim of discrimination, she had several full and adequate administrative remedies in the State University System which she could have pursued. Instead, she has apparently elected to bypass these procedures and prematurely burden this Court with her claims. Plaintiff's failure to present her grievances to the appropriate administrative agencies undermines any possible claim of "institutional finality." Accordingly, for this reason, plaintiff's alleged claims should be dismissed for lack of subject matter jurisdiction.

II. THIS COURT SHOULD DISMISS THE AMENDED COMPLAINT FOR FAILURE TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Respondeat Superior Fails To Provide Any Adequate Basis For Imposing § 1983 Liability Upon The BOR.

Assuming, arguendo, that the BOR is a "person" under § 1983, the complaint fails to allege an adequate predicate for imposing liability. The complaint alleges the FIU has discriminated against plaintiff and assumes BOR's responsibility for this alleged § 1983 misconduct based on an agency or respondeat superior theory of liability. However, it is clear that respondeat superior fails to provide an adequate basis for imposing § 1983 liability. Monell, supra, 56 L. Ed. 2d at 635-638. In sum, unless plaintiff in good faith can allege that the official policies of the BOR caused the alleged discrimination (See Ch. 6C-5.01 Fla. Admin. Code) or that the BOR

authorized or ratified the alleged misconduct, the § 1983 claims should be dismissed with prejudice. Jones v. City of Memphis Tenn., 586 F.2d 622, 624-625 (6th Cir. 1978); Duchesne v. Sugarman, 566 F.2d 817, 830 (2d Cir. 1977); Kostka v. Hogg, 560 F.2d 37, 39 (1st Cir. 1977); Sims v. Adams, 437 F.2d 829, 832 (5th Cir. 1976)(Court noted with approval that the complaint did not rest on any theory of vicarious liability); Bracey v. Grenoble, 494 F.2d 566, 569-570 (3d Cir. 1974); Jennings v. Davis, 476 F.2d 1271, 1274 (8th Cir. 1973); Adams v. Pate, 445 F.2d 105, 107 (7th Cir. 1971).

B. Plaintiff's "Discrimination" Allegations Are Inadequate To State A Justifiable Claim Upon Which Relief Can Be Granted.

In essence, plaintiff has invited this Court to declare "affirmative action"

policies, which may have affected her, unconstitutional. The Court should view her invitation as defective for several reasons.

The federal government (Department of Health, Education, and Welfare) requires the BOR to maintain an "affirmative action" policy. 45 C.F.R. §§80.3, 80.4, 80.5 (1978). Pursuant to that obligation, FIU administrators must indeed make an "intentional and concerted effort" to seek out and hire qualified members of minority groups. Although in a different context, the U.S. Supreme Court recently sanctioned a university's consideration of a person's minority status in its admissions policies. University of California v. Bakke, 438 U.S. 265, 57 L.Ed. 2d 750 (1978). The constitutionality of affirmative action programs in the employment context is also presently be-

fore the Supreme Court. See Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216 (5th Cir. 1977), cert. granted, 58 L.Ed. 2d 704 (1978). Given the compromise course which Bakke followed, it would seem most unlikely that the Supreme Court will declare employment-related affirmative action programs unconstitutional. In sum, the mere fact that the BOR or FIU has made an affirmative action commitment does not entitle plaintiff to any relief.

Plaintiff complains that she failed to secure various positions for which she applied and was qualified while non-whites and Latins generally fared better. Absent any allegation that the minority members selected for these positions lacked the requisite qualifications, however, plaintiff's discrimination charges lack constitutional significance. The

complaint totally fails to place plaintiff in the position of a "Bakke" or a "Weber". Affirmative action programs are a sanctioned fact of life. Only when race mechanically (e.g., a quota system) serves to favor the objectively unqualified at the expense of the objectively qualified - scores or grades (Bakke) or seniority (Weber) - does discrimination in a constitutional sense allegedly exist. Clearly plaintiff's present complaint does not place her in any category which would entitle her to judicial relief.

In sum, absent any specific allegations that, as to a particular hiring decision, plaintiff was rejected in favor of an unqualified (or even lesser qualified) minority applicant because of race, her complaint, like the recent Sears suit, Sears, Roebuck Co. v. Attorney General of the United States, ____F.Supp ____, 19

EPD ¶9164A (D. DC. 1979), should be viewed merely as a "political essay." While the complaint may provide philosophical grist for the executive or legislative "mills," it does not presently warrant grinding by the federal judiciary.

III. THIS COURT SHOULD REQUIRE PLAINTIFF TO RENDER A MORE DEFINITE STATEMENT OF HER CLAIMS.

Should the Court deny the motions to dismiss or dismiss the complaint with further leave to amend, then the Court, in fairness to the BOR, should require plaintiff to render a more definite statement of her claim. Granted, federal "notice" pleading requirements under Rule 8, Fed. R. Civ. P., are quite liberal. However, several of plaintiff's allegations are so vague or ambiguous that the BOR cannot reasonably frame a responsive pleading.

Plaintiff contends she has worked at FIU since 1972 and has applied for numerous positions consistently without success although many Latins and non-whites were selected. (Complaint ¶¶ 5, 7). In Paragraph 8, she partially lists those positions for which she has unsuccessfully applied. In Paragraphs 11(a), 12, 13 and 16(a), plaintiff makes conclusory sex and/or race discrimination allegations. A more definite statement of her claims should remedy the following ambiguities and questions before the BOR must respond:

Sex discrimination - Other than her conclusory allegations in Paragraphs 11(a) and 16(a), the complaint fails to indicate when or where plaintiff allegedly suffered sex discrimination. Indeed, sex discrimination charges appear to have no relationship to her grievances.

Racial Discrimination - The complaint does not indicate which particular hiring decisions were allegedly improper. Every position for which plaintiff applied? Only those positions in Paragraph 8? Every position for which plaintiff applied and a minority member was selected? In sum, what specific hiring decisions does plaintiff desire this Court to examine for alleged impermissible minority preferences, and when did they occur?

As to each specific challenged hiring decision, why is it allegedly discriminatory? Did the minority member selected allegedly lack the requisite qualifications? Did plaintiff allegedly possess superior qualifications?

The elimination of these ambiguities in the complaint would minimize expensive and time-consuming discovery. In sum, plaintiff has launched an across-the-board

attack on FUI's affirmative action programs which may have affected her. All the BOR requests is for plaintiff to identify which employment decisions it must defend and why. Since this request only slightly inconveniences plaintiff, the BOR respectfully submits that the potential savings in terms of discovery time and expense attest to the reasonableness and fairness of a more definite statement.

CONCLUSION

The federal government and most state governments have woven "affirmative action" into the political and economic fabric of this country. Plaintiff's ambiguous "reverse discrimination" complaint provides inadequate justifications for this Court to examine whether FIU's required affirmative action efforts have

violated her constitutional rights. She has prematurely chosen to burden this Court with legally defective allegations. Adequate administrative remedies and, suitable judicial vehicles for securing any necessary equitable and legal relief certainly exist. Pending her pursuit of either administrative or appropriate legal remedies, this Court should not accept her defective invitation to scrutinize personnel decisions for alleged constitutional infirmities. For all the preceding reasons, defendant BOR respectfully requests this Honorable Court to dismiss the amended complaint. Alternatively, the BOR respectfully requests a more definite statement of plaintiff's claims.

Respectfully submitted,

GUY O. FARMER II
JEFFREY H. KLINK
Mahoney, Hadlow & Adams
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

JOHN W. KOZYAK
Mahoney, Hadlow & Adams
1401 First Federal Building
One Southeast 3rd Avenue
Miami, Florida 33131
(305) 358-5550

By /s/
Jeffrey H. Klink

[CAPTION]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The Plaintiff herein files this memorandum of law in opposition to the motion to dismiss amended complaint and memorandum of law in support thereof filed on behalf of the Defendant, BOARD OF REGENTS, hereinafter referred to as BOARD.

Initially, it should be noted that:

> "On a motion to dismiss, material allegations of the complaint are taken as admitted, and the complaint is to be liberally construed in favor of the plaintiff. Jenkins v. McKeithen, 395, U.S. 411, 421 n.89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969)." Kennedy v. H & M Lading, Inc., 529 F.2d 987 (9th Cir. 1976).

In addition:

> "Ordinarily a motion to dismiss should be disfavored and doubt should be resolved in favor of the pleader." Williams v. Gorton, 529 F.2d 668 (9th Cir. 1976).

It has also been held that a case brought under Section 1983, Title 42 U.S.C., should be not dismissed at the pleading

stage unless it appears to a certainty that the Plaintiff would be entitled to no relief under any state of facts which could be proven in support of his claim. Conley v. Gibson, 355 U.S. 41 (1957); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); and Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968).

IS THE BOARD OF REGENTS A "PERSON" WITHIN THE MEANING OF 42 U.S.C., SECTION 1983

Florida Statute, Section 240.042 creates the BOARD OF REGENTS as follows:

> "(1) The Board of Regents is hereby created as a body corporate, and shall have a corporate seal; shall elect a corporate secretary; shall have and employ a staff attorney and all other necessary personnel; shall have power to contract and be contracted with; to sue and be sued; to plead and be impleaded in all courts of law and equity; . . ." (Emphasis supplied).

The Legislature of the State of Florida, in their wisdom, has seen to it that the BOARD OF REGENTS of the State of Florida is an entity subject to the jurisdiction of this Court and properly named as a party defendant in this action. It has been recognized in Byron v. University of Florida, 403 F.Supp. 49 (N.D. Fla. 1975) that:

> " . . . under Florida law the University is not endowed with separate corporate existence, nor with the authority to be sued in its own name. Rather those characteristics are bestowed upon the Board of Regents, as need of the State's University System." (Emphasis supplied).

Likewise in Wolfe v. O'Neill, 336 F.Supp. 1255 (D.Alaska 1972) and Craig v. Alabama State University, 451 F.Supp. 1207 (M.D. Ala. 1978), it was held that the Board of Regents and a Board of Trustees were "persons" within the mean-

ing of the 1871 Civil Rights Statute (42 U.S.C., §1983).

Clearly, based upon the above and foregoing authorities in the State of Florida, the BOARD OF REGENTS is an entity properly before this Court.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Defendant has claimed that the complaint herein be dismissed for the failure of the Plaintiff to have availed herself of and/or exhaust certain alleged administrative remedies to undue the grievous wrong inflicted upon her.

It is the law from the Supreme Court of the United States and from the Fifth Circuit that exhaustion of neither State administrative nor State judicial remedies are required prior to bringing an action pursuant to 42 U.S.C., §1983. Chief Judge Brown in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), Judge Wisdom in Moreno

v. Henckel, 431 F.2d 1299 (5th Cir. 1970) and Judge Goldberg in Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971), speaking for their respective panels, all concluded that one of the purposes underlying 42 U.S.C., §1983 is to provided a remedy in Federal court which is supplementary to any remedy in State proceedings. See also, Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827 (1973); Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232 (1972) and McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433 (1973).

Based upon the above and foregoing authorities, neither exhaustion of state nor judicial remedies were required as a prerequisite to bringing the action in this Court.

RESPONDEAT SUPERIOR

Defendant claims unequivocally "that respondeat superior fails to provide an adequate basis for imposing Section 1983 liability." The law is not as clear, especially in the Fifth Circuit as the Defendant suggests:

> "Moreover, assertions of insulation from liability because §1983 does not permit derivative, respondeat superior, liability are questionable, and, at best, overbroad. It is true that some cases hold that absent overt acts, §1983 does not authorize recovery of monetary damages through respondeat superior, see, e.g., Johnson v. Glick, 2 Cir. 1973, 481 F.2d 1028; Adams v. Pate, 7 Cir. 1971, 445 F.2d 105, but this circuit has carved out some exceptions to this rule. A sheriff may be held liable for the actions of his appointed deputies, over whom he has control, in certain circumstances. See e.g., Madison v. Gerstein, 5 Cir. 1971, 440 F.2d 338. Even more to the point this court has established in several fairly recent cases that 'prison administrators may under certain circumstances be held vi-

> cariously liable for the act of their subordinates'. See Carter v. Estelle, 5 Cir. 1975, 159 F.2d 1136; Holland v. Connors, 5 Cir. 1974, 491 F.2d 539; Parker v. McKeithen, 5 Cir. 1974, 488 F.2d 553, cert. denied, 419 U.S. 838, 95 S.Ct. 67, 42 L.Ed. 2d 65; Tuley v. Heyd, 5 Cir. 1973, 482 F.2d 590. At this stage, it is impossible to determine whether or not Taylor's broad allegations will support derivative liability under a respondeat superior theory." Taylor v. Gibson, 529 F.2d 709, 716 (5th Cir. 1976).

See, in addition, Croy v. Skinner, 410 F.Supp. 117, 123 (N.D. Ga. 1976). Some courts have rejected the limitation upon liability urged by the defendants altogether. See Santiago v. City of Philadelphia, 435 F.Supp. 136, 148-49 (E.D. Pa. 1977). The Fifth Circuit has also had this to say about the matter: "On usual principles of agency persons may be held accountable for the acts of others under §1983." Gomez v. Florida

State Employment Service, 417, F,2d 569, 578 n.34 (5th Cir. 1969).

Additionally, the Defendant in the memorandum of law filed with this Court claims that Plaintiff is asking this Court to declare "affirmative action policies" unconstitutional. The Defendant then goes on to try and justify the alleged discriminatory conduct on the part of the Plaintiff under the mandate of governmental affirmative action programs. Nowhere, in Plaintiff's complaint are Defendant's "affirmative action programs" even discussed, assuming they exist and in any event, Defendant is arguing matters before this Court which are outside of the face of the complaint, that argument being improper on a motion to dismiss.

WHEREFORE, counsel prays this Honorable Court to deny the motion to dismiss filed herein, to find that the complaint

sufficiently sets forth allegations to enable Defendant to plead and to allow this action to proceed accordingly.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF
EUGENE P. SPELLMAN
Attorneys for Plaintiff
100 North Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132
Telephone: (371-3477)

By: /s/
DENIS DEAN, SR.

[CAPTION]

ORDER

THIS CAUSE having come before the Court on Defendant's motion to dismiss for lack of jurisdiction for plaintiff's failure to allege exhaustion of administrative remedies under principles enunciated by Penn v. Schlesinger 497 F.2d 970 (5th Cir. 1974), and having considered the motion and being otherwise duly advised,

It is thereupon

ORDERED AND ADJUDGED that Defendant's motion to dismiss be granted for Plaintiff's failure to exhaust administrative remedies.

DONE AND ORDERED at Miami, Florida, this 9th of July, 1979.

JOSE A. GONZALEZ
UNITED STATES DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGIA PATSY,

Petitioner,

—VS.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF, FLORIDA INTERNATIONAL UNIVERSITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MITCHELL D. FRANKS
DEPT. OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
Suite 1501
The Capitol
Tallahassee, FL 32301
(904) 488-1573

JEFFREY H. KLINK
MAHONEY HADLOW & ADAMS
800 Barnett Bank Building
100 Laura Street
P. O. Box 4099
Jacksonville, FL 32201
(904) 354-1100

Counsel for Respondent

NO. 80-1874

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SUPREME COURT OF THE UNITED STATES

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GEORGIA PATSY,

Petitioner,

vs.

BOARD OF REGENTS OF THE STATE OF FLORIDA, A Body Corporate, For And On Behalf Of, FLORIDA INTERNATIONAL UNIVERSITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Board of Regents of the State of Florida ("Board") respectfully opposes petitioner's request for review of the decision of the United States Court of Appeals for the Fifth Circuit. Further, the Board respectfully submits that the petition for a writ of certiorari raises questions that differ from those asserted by petitioner.

QUESTIONS PRESENTED

1. Whether this Court should grant any petition before the lower courts have determined the existence of federal jurisdiction or required Patsy to exhaust state administrative remedies.

2. Whether the Fifth Circuit's adoption of a flexible doctrine concerning the need for prospective § 1983 claimants to pursue state administrative remedies before seeking federal judicial relief conflicts with the holdings of this Court and other Circuits, or with Congressional intent.

3. Whether this Court should grant the petition and summarily vacate the Fifth Circuit's decision with instructions to dismiss Patsy's § 1983 employment discrimination claims for lack of jurisdiction.

4. Whether this Court should accept review and summarily affirm but defer plenary guidance on the important and numerous issues concerning prior resort to state administrative remedies in § 1983 cases un-

til the lower federal courts have had an opportunity to develop a body of common law to provide possible aid to assist in that guidance.

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Statutory Authorities

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S. Rep. No. 96-416, 96th Cong., 2d Sess. (Nov. 15, 1979)..... 16, 17,

JURISDICTION

Petitioner bases this Court's jurisdiction on 28 U.S.C. § 1254(1), the statutory provision governing certiorari. Petitioner does not state a basis for, and thus apparently assumes, the existence of federal and subject matter jurisdiction. As is explained in Part III, A, infra, the Eleventh Amendment and the "person" limitation of § 1983 preclude federal court jurisdiction over Patsy's claim. Additionally, the courts lack subject matter jurisdiction to review Patsy's allegations of employment discrimination under § 1983. See Part III, B. Consequently, if the Court grants the writ of certiorari, it should do so for the limited purpose of reviewing the issue of federal jurisdiction. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978); City of Kenosha v. Brumo, 412 U.S. 507 (1973); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Eleventh Amendment, U.S. Constitution, provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1983 (Pet. 2)

42 U.S.C. § 1997e (Pet. 2, 132a)

Fla. Stat. Ann.

The following provisions of the Florida Code are set forth infra, in the Appendix:

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STATEMENT OF THE CASE

Alleging that a policy of "minority preference" or her sex had produced unsuccessful applications for a variety of positions at Florida International University ("FIU")[1], plaintiff-petitioner ("Patsy") filed a § 1983 discrimination suit against her state employer.[2] The defendant-respondent ("Board") moved to dismiss Patsy's claims for judicial relief as foreclosed by the Eleventh Amendment as being premature. Without addressing the alternative jurisdictional grounds, the district court dismissed Patsy's complaint without pre-

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1. One of the nine state universities that comprise the State University System which is operated and managed by the Board of Regents of the State of Florida ("Board"), a corporate state agency, with state-appropriated funds. See pp. a-1 et seq., infra.

2. After the district court dismissed Patsy's initial complaint against FIU for lack of legal capacity to be sued, she filed an amended complaint against the Board. She seeks a "judicial promotion" to the first available and suitable position or $500,000 in damages. (Pet. 3a).

judice for "failure to exhaust administrative remedies." (Pet. 128a). Patsy appealed on the sole ground that the dismissal order violated what she perceived as this Court's ironclad "no exhaustion" rule.[3]

The Fifth Circuit panel agreed with Patsy and reversed per curiam without addressing the Eleventh Amendment issues. (Pet. 126a). The Board's petition for a rehearing en banc of the panel's ironclad "no exhaustion" rule was granted.

After detailed examination of prior decisions of this Court, the en banc majority concluded that resort to administrative remedies could and should "sometimes precede federal court consideration of section 1983 claims."[4] (Pet. 4a-5a). This

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3. Indeed, until the filing of her petition with this Court, Patsy had never challenged the Board's contentions as to the adequacy of her administrative remedies. (Pet. 54a).

4. A conclusion which the majority emphasized was neither foreclosed nor compelled by this Court's precedent. (Pet. 29a-30a).

conclusion was based on more than simply the policy concerns that support the general rule of exhaustion, McKart v. United States, 395 U.S. 185, 193-195 (1969).

The majority also reasoned that an ironclad rule would: a) subject state and federal defendants to disparate treatment for the same alleged violations by imposing unfair burdens on state defendants (Pet. 30a-31a, 41a, 44-46a); b) preclude steps otherwise necessary to insure the "ripeness" of a claim for judicial resolution (Pet. 36a, 46a); and c) adversely affect fundamental notions of federalism and comity (Pet. 46a). Despite these considerations, however, the decision adopted only a flexible exhaustion requirement. (Pet. 50-51a).

Under the Fifth Circuit's ruling, no § 1983 claimant must resort to administrative channels before filing suit unless those remedies satisfy certain "minimum

conditions"[5] and the needs for exhaustion in light of the particular claims asserted must justify their pursuit. (Pet. 51a). Finding the record inadequate to make these determinations in the case sub judice, the Fifth Circuit remanded with instructions to permit plaintiff to amend her complaint and to apply the "principles set forth in [the] opinion" in determining whether prior resort to administrative channels should be required. (Pet. 55a).

Patsy now seeks this Court's discretionary review and summary reversal, vacation, or plenary consideration of this decision. (Pet. 35, 44) Reading it to

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5. "First, an orderly system of review or appeal must be provided by statute or written agency rule. Second, the agency must be able to grant relief more or less commensurate with the claim. Third, relief must be available within a reasonable period of time. Fourth, the procedures must be fair, and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims. Fifth, interim relief must be available, in appropriate cases, to prevent irreparable injury and to preserve the litigant's rights under section 1983 until the administrative process has been concluded." (Pet. 50a).

require "all § 1983 plaintiffs [including herself to] exhaust state administrative remedies," Patsy submits that the decision conflicts with an inexorable "no exhaustion" rule of this Court and other circuits or with the "adequacy holding" of McNeese v. Board of Education, 373 U.S. 668 (1963), and with Congressional intent. (Pet. i-ii) For all the following reasons the Board respectfully opposes Patsy's petition.

SUMMARY OF REASONS FOR OPPOSING THE PETITION

I. The petition warrants this Court's denial for two reasons:

A. The Fifth Circuit's remand and the unresolved jurisdictional issues render the petition untimely if not premature. The district court must determine if Patsy should first pursue administrative remedies and, if so, for what reasons. For example, the Fifth Circuit has directed inquiry as to whether Patsy's conclusory claims are ripe for adjudication before seeking administra-

tive relief. The resolution of that issue will also involve the initial finding as to the adequacy of administrative remedies. Thus, the perceived "adequacy" holding of McNeese v. Board of Education, supra, hardly presents a timely reason for review. Of greater importance, the lower courts have yet to determine the existence of federal jurisdiction in light of the Board's status under the Eleventh Amendment and § 1983. While this Court could grant the petition and resolve these issues itself, their initial consideration below would develop a better if not essential record for that potential review.

B. The decision's flexible exhaustion rule presents no real conflict questions. For actual conflict to exist, this Court must have established an ironclad "no exhaustion" rule. For the reasons respectfully outlined in the decision below and by both the Second and Seventh Circuits, no

such rule exists. Moreover, the Fifth Circuit's decision rests on several reasons which neither this Court, nor the other Circuits, have ever fully addressed, let alone rejected.

Additionally, the decision furthers rather than violates the Congressional intent embodied in § 1983 (Pet. 40a), and this Court has repeatedly refused to make states silent partners in our federal system for the protection of Constitutional rights. Indeed, Congress has recently outlined specific procedures that suggest the propriety of prior state administrative involvement before an employment discrimination claimant such as petitioner may seek federal judicial relief. While 42 U.S.C. § 1997e outlines "standards" not identical to the "conditions" in the decision below, it neither precludes the rule provided by the Fifth Circuit nor applies to Patsy, who can hardly be considered a prisoner or

"institutionalized."[6] More importantly, neither that statute nor its legislative history properly support the implication that Congress intended to preclude judicial inquiry into the possible needs for exhaustion in other contexts. Of course, the Fifth Circuit decision arguably encompasses prisoner § 1983 claims. However, this case clearly does not present the need for any possible modifications. In any event, no "will of Congress," imagined or expressed, can extend federal jurisdiction to claims not ripe for adjudication.

II. Should this Court elect to pretermit initial resolution of jurisdictional issues by the lower courts, the Board respectfully submits that the Court should summarily vacate the decision below with instructions to dismiss for the following reasons:

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6 Indeed, it is noted in passing that Patsy recently enjoyed the "freedom" to request and have granted a six-month leave of absence.

A. The Board's Eleventh Amendment and "non-person" status under § 1983 preclude federal jurisdiction. As an "arm of the state" the Board enjoys an unwaived and unabrogated immunity from federal suit under the Eleventh Amendment and "non-person" status under § 1983.

B. Title VII provides Patsy's exclusive relief for alleged employment discrimination. As with § 1985, § 1983 provides claimants only a remedy - not any substantive rights. As the relief Patsy seeks falls within the detailed statutory framework of Title VII, that provision constitutes her exclusive remedy.

REASONS FOR OPPOSING THE PETITION

I. THE PETITION LACKS PROCEDURAL RIPENESS AND THE LOWER COURTS HAVE YET TO DETERMINE THE EXISTENCE OF FEDERAL JURISDICTION OVER PETITIONER'S CLAIMS ON GROUNDS BOTH RELATED AND UNRELATED TO THE EXHAUSTION ISSUE.

Whether Patsy must pursue administrative remedies, and, if so, for what reasons

must await further proceedings on remand. The Fifth Circuit's decision has not imposed an exhaustion requirement on Patsy, and the district court could find exhaustion unwarranted in this case. Brotherhood of Locomotive Firemen and Enginemen v. Bangor Aroostook Railroad Co., 389 U.S. 327 (1967). Granted, the potential mootness of Patsy's standing to challenge the Fifth Circuit's flexible rule does not preclude the writ. See generally Securities Exchange Commission v. Sloan, 436 U.S. 103 (1978); Zablocki v. Redhail, 434 U.S. 374 (1978); but see Dupris v. United States, ___ U.S. ___, 64 L. Ed. 2d 836 (1980); Patterson v. Warner, 415 U.S. 303 (1974). However, further proceedings will create a more complete if not necessary record of the potential reasons for exhaustion. Indeed, one of the potential reasons for prior resort to administrative relief would be to insure the "ripeness" of Patsy's claims for

adjudication[7]. Moreover, further proceedings will allow the lower courts to address the jurisdictional issues concerning the Board's status under the Eleventh Amendment and § 1983. See Discussion, pp. 23-24, infra. Of course, this hardly precludes this Court from addressing these issues in the first instance. Edelman v. Jordan, 415 U.S. 651, 667 (1974). However, their initial resolution by the lower courts will, again, permit a more thorough and expeditious review.

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7. Patsy's complaint (See Record Excerpts Assembled by Defendant-Appellee, pp. 38-60) contains no allegations of Board policy or involvement in the alleged discrimination. Athough Patsy has sued the Board because FIU lacks the capacity to be sued, she nevertheless seeks to hold the Board accountable for the alleged discrimination. As respondeat superior fails to provide an adequate predicate for liability, Monell v. Department of Social Services, 436 U.S. 658 (1978) exhaustion may be particularly appropriate to assure the ripeness of these claims for adjudication. See also, Parratt v. Taylor, ___ U.S. ___, 49 U.S.L.W. 4509, 4511, n.3 (1981).

II. THE DECISION BELOW FAILS TO PRESENT ANY REAL CONFLICT QUESTIONS:

A. No Actual Conflict Exists Between The Decision Below And Prior Holdings Of This Court Or Other Circuits

Unless this Court has established an ironclad rule precluding the need for prospective § 1983 claimants to resort to administrative remedies under any circumstances, no actual conflict exists. For the reasons respectfully outlined in the decision below, no decision of this Court has fully addressed the need for, let alone required, such a blanket rule. (Pet. 13a-31a). Moreover, in adopting a flexible, analytical rule, the decision below rests on several reasons which this Court has neither considered nor rejected.[8] Cf.

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8 For example, the proposition that exhaustion may be necessary to insure "institutional finality" and "ripeness" of a claim for adjudication has not been addressed by this Court. Stevenson v. Board of Education, 426 F.2d 1154, 1157 (5th Cir.) cert. denied, 400 U.S. 457 (1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970). Patsy contends in conclusory fashion that

United States v. Rands, 389 U.S. 121, 125 (1967). Hence, the alleged conflict with this Court's holdings and those by other Circuits[9] is apparent - not real.

B. The Decision Below Does Not Conflict With Congressional Intent

Patsy's extensive reliance upon the perceived negative implications of 42 U.S.C. § 1977e is misplaced. Whether or not the views of a later Congress are probative in interpreting an earlier statute, compare United States v. Southwestern Cable Co.,

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FIU practices a policy of "minority preference" which resulted in "reverse discrimination" concerning her promotion opportunities. However, the Board has a written policy prohibiting employment discrimination and possesses the power to remedy any deviations from that policy. See, Record Excerpts Assembled by Defendant-Appellee, pp. 38-60, 67.

9 None of the other Circuit cases cited by Patsy (Pet. 13-14 n.6) or the decision below (Pet. 31a-36a) support an ironclad "no exhaustion" rule for substantive reasons that conflict with the Fifth Circuit's adoption of a flexible rule. Analysis of those decisions reveals that they merely rely on the Supreme Court cases distinguished by the Fifth Circuit.

392 U.S. 157 (1968) and Haynes v. United States, 390 U.S. 85 (1968) with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), analysis of the subsequent legislation relied on by Patsy demonstrates that Congress has not limited judicial discretion to impose an exhaustion requirement under § 1983. See also Parratt v. Taylor, ___ U.S. ___, 49 U.S.L.W. 4509, 4516, n.13 (1981) (Powell, J., concurring). Patsy's contention is necessarily premised on the implicit assumption that Congress considered and rejected any exhaustion limitation in every situation where it has not imposed that requirement, and particularly in every § 1983 context other than that addressed by § 1997. This premise misconstrues the breadth of § 1997e as well as the nature of the legislative process, and would effectively nullify all judicially imposed exhaustion limitations on federal statutory provisions. See, e.g., Renegotiation Board

v. Bannercraft Clothing Co., 415 U.S. 1 (1974); McGee v. United States, 402 U.S. 479 (1971); cf. Vaca v. Sipes, 386 U.S. 171 (1967).

Congress enacted the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, in 1980, for the express purpose of empowering the Justice Department to bring suit to remedy violations of the constitutional rights of persons institutionalized in prisons and other state facilities. Section 1997e requires that state administrative remedies be exhausted prior to bringing suit if those remedies comply with certain standards. This provision, however, was not given extensive consideration by either the opponents or supporters of the legislation. The extensive hearings preceding the bill's passage centered on other issues.

In any event, it appears the principal reason for the exhaustion provision's

inclusion in the Act was to provide an incentive for states to improve their ability to protect the rights of the institutionalized. S. Rep. No. 96-416, 96th Cong., 2d Sess., Senate Judiciary Committee (Nov. 15, 1979) at pp. 1-3. As noted in the Senate report, "[t]he demonstrated failure of numerous states to fulfill their constitutional obligations to their institutionalized citizens . . . makes Federal enforcement of such obligations both appropriate and necessary." Id., at 19. Patsy's perceived intent of Congress to preclude resort to administrative remedies in other § 1983 contexts "blinks in the face of the obvious."[10] Indeed, as noted by Congress in enacting § 1997:

> Federal Courts have punctiliously avoided precipitous intervention

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10 In contrast to its conclusions regarding the institutionalized, Congress has not suggested that states have inadequately protected the rights of their employees. Patsy characterizes the various state remedies related to § 1983 as "time-consuming, (continued on next page)

> in State affairs, allowing defendants the greater possible leeway in divising methods to bring their institutions up to constitutionally accepted standards. Only when state officials have failed to comply with constitutionally mandated judicial orders have Federal Courts imposed specific requirements for institutional operations.

Id., at 25; See generally, Stone v. Powell, 428 U.S. 465, 492, n.35 (1976).

Congress is clearly aware that the courts originated the doctrine of exhaustion of administrative remedies and have had

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often ineffective, and nearly always inadequate." (Pet. 13). The evidence before Congress in enacting § 1997, however, was limited exclusively to the lack of adequate state procedures available to the institutionalized; none of the evidence reviewed by Congress supports Patsy's criticism. Additionally, as demonstrated by the fact that the administrative procedures provided by Florida are designed to protect Patsy's rights, the circumstances existing when § 1983 was passed or even when Title VII was enacted no longer exist today. States deserve the opportunity to utilize the effective administrative procedures they have worked to implement. Certainly the deferral scheme of Title VII is intended to support such state initiative. 42 U.S.C. § 2000e-5(b) (1974). If exhaustion of adequate state administrative remedies is not required, a disincentive to provide simple, effective administrative relief is substituted for the incentive supplied by § 1997.

extensive experience in its application. Congress chose to enact § 1997e because of the perceived inability of the courts to require exhaustion in a context that clearly warranted it. Moreover, in enacting § 1997e, supporters of the bill stated that exhaustion served several purposes, including: (1) exhaustion would reduce the substantial backlog in the federal court system caused by § 1983 cases; (2) an exhaustion requirement should induce each state to carefully concern itself with the rights of persons within its province; (3) exhaustion would permit the state agencies to frame the issues and supply a record to a court, should judicial proceedings eventually be necessary; and (4) exhaustion will enable state agencies to gain further expertise in the areas involved. S. Rep. No. 96-416, supra at 34; H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. (Apr. 22, 1980) at 15, 16.

The decision below is based in part on, and advances, the same considerations.

In sum, neither § 1997e nor its legislative history evidences a Congressional intent to disapprove of either exhaustion in other § 1983 contexts or the reasons articulated below in adopting a flexible rule. Indeed, the purposes of § 1997e coupled with the express exhaustion requirements applicable to employment discrimination claims under Title VII cogently suggest that Congress would welcome - not reject - the flexible rule adopted below. Unlike Jenkins v. Brewer, ___ U.S. ___, 49 U.S.L.W. 3616 (1981), this case presents no need for reconsideration or modification of the decision below in light of §1997e as Patsy is not "institutionalized." In any event, the "standards" imposed by § 1997e (Pet. 134a-135a) are fairly encompassed by the minimum "conditions" outlined in the decision below. (Pet. 50a) In fact, in several

respects, the Fifth Circuit's rule provides a complainant with more protection than the administrative standards of § 1997. Finally, in addition to the more telling legislative intent reflected in the deferral scheme of Title VII, recent decisions of this Court hardly reflect an intent to preclude state resolution and protection of constitutional rights. E.g., Stone v. Powell, supra; Allen v. McCurry, ___ U.S. ___, 66 L.Ed.2d 308 (1980). Given these circumstances, effective state administrative remedies should be embraced rather than indicted.

C. The Decision Below Does Not Present A Question Of Conflict With This Court's Decion in McNeese v. Board of Education.

The Fifth Circuit has not directed Patsy to pursue any administrative remedies, let alone those she perceives as condemned by McNeese, supra. Moreover, the appellate court's silence on the issue of "burdens" can hardly be construed as conflicting with

perceived law on the subject. In any event, Patsy's reliance upon McNeese is misplaced.

Patsy's contention that McNeese requires the state to prove the adequacy of its administrative remedies is not clearly supported by the decision. Additionally, the Board disputes Patsy's contention that personnel involved in the remedies available to her are, like those persons in McNeese, not empowered to grant relief. Unlike the state administrators in McNeese, FIU officials have the right and ability to remedy a complaint rather than to merely recommend a solution.[11] However, as Patsy never

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11 Even if Patsy's contention to the contrary were true, the Board submits that the remedies below are not "inadequate." The standards of adequacy need not necessarily be measured by the enforceability of a final administrative determination. Neither the standards articulated in § 1997 nor the scheme established by Title VII provide for an enforcement mechanism outside the court system. Additionally, one of the central purposes of an administrative system is to effectively resolve a significant number of the complaints with which it deals; it clearly is not required to remedy every claim it addresses.

raised this argument below, the Board - irrespective of the nature of its burden of proof - never had an opportunity to dispute this or any other belated factual contention through evidence or argument. Accordingly, this issue should not be addressed at this time, United States Parcel Service, Inc., v. Mitchell, ___ U.S. ___, 67 L.Ed. 2d 732, 738, n.2 (1981); Dothard v. Rawlinson, 433 U.S. 321, 323, n.1 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n.2 (1970), but left for resolution in the trial court, as the Fifth Circuit's remand properly directed. The question of adequacy is highly factual in nature and should be treated first by the district court, if for no other reason than to provide a sufficient record for later resolution on appeal. Jenkins v. Anderson, ___ U.S. ___, 65 L.Ed. 2d 86, 92, n.1 (1980).

III. THE FEDERAL COURTS LACK JURISDICTION OVER PATSY'S § 1983 EMPLOYMENT DISCRIMINATION CLAIMS AGAINST THE BOARD

Should this Court grant the writ, the Board respectfully submits that review should be limited to the jurisdictional issues discussed below and this Court should vacate the Fifth Circuit's decision with instructions to dismiss Patsy's suit for lack of jurisdiction.

A. The Board's Eleventh Amendment and Non-Person Status Under § 1983 Preclude Federal Jurisdiction.

The Florida statutory provisions outlined in relevant part in the Appendix reflect the Board's status as an "arm of the state" for Eleventh Amendment purposes. Florida Dept. of Health v. Florida Nursing Home Ass'n, ___ U.S. ____, 67 L.Ed. 2d 132 (1981); Quern v. Jordan, 440 U.S. 332 (1979); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Mt. Healthy City Bd. of Ed. v.

Doyle, 429 U.S. 274, 280 (1977).[12] Accordingly, it enjoys unwaived and unabrogated immunity from suit in federal court, and Monell v. Department of Social Services, 436 U.S. 658 (1978) clearly does not affect its "non-person" status under § 1983.[13]

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12 See also Whiting v. Jackson State Univ., 616 F.2d 116, 127, n.8 (5th Cir. 1980); Martin v. Louisville, 541 F.2d 1171 (6th Cir. 1976); Vaughn v. Regents of the University of California, 504 F. Supp 1349 (E.D. Cal. 1981); Weisbord v. Michigan State Univ., 495 F. Supp. 1347 (W.D. Mich. 1980); Selman v. Harvard Medical School, 494 F. Supp 603 (S.D.N.Y. 1980), aff'd. 636 F.2d 1204 (2d Cir. 1981); Zentgraf v. Texas A&M Univ., 492 F. Supp 265 (S.D. Tex. 1980); Hart v. University of Texas, 474 F. Supp 465 (N.D. Tex. 1979); Henry v. Texas Tech. Univ., 466 F. Supp. 141 (N.D. Tex. 1979); Byron v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975).

13 The Board's status as part of the state also compels the conclusion that it is not a "person" subject to suit under § 1983. Monell, supra, overruled Monroe v. Pope, 365 U.S. 167 (1961) only insofar as it had immunized local governments, municipal corporations and local independent school boards from suit under § 1983. The Court explicitly noted that its decision did not affect the status of governmental units which are "considered part of the state for Eleventh Amendment purposes." Id. at 690, n.54. Additionally, the fact that Patsy has sued the Board, for and on behalf of FIU, does not alter this conclusion. As a legal non-entity, clearly FIU lacks "person" status. Moreover, FIU is still part of the state for Eleventh Amendment purposes. See university cases cited at note 12, supra.

B. Subject Matter Jurisdiction Over Patsy's Employment Discrimination Claims Does Not Properly Lie Under § 1983.

Petitioner's claim of discrimination clearly relates to the terms and conditions of her employment, and as such constitutes an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Petitioner has never, however, filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or otherwise attempted to invoke the detailed administrative procedures and salutory policies of that Act. Her attempted avoidance of the Title VII administrative scheme by seeking immediate relief under § 1983 should not be condoned.

In Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979), this Court held that § 1985 of the Civil Rights Act of 1871 could not be invoked to redress violations of Title VII. Like § 1985, § 1983 creates no substantive

rights.[14] Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979). Thus, any employment-related suit brought under either statute is nothing more than the assertion of a Title VII right in an alternative remedial framework. If permitted, "a complainant could avoid most if not all of [the] detailed and specific provisions of [Title VII]" including the crucial administrative process that is central to the Act. Clearly Congress did not contemplate such a result.

The analysis in Novotny is supported by other contexts. The importance of the administrative process of Title VII was relied upon in Brown v. General Services

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14 This court's holding in Johnson v. Railway Express Agency, 421 U.S. 454 (1985), that 42 U.S.C. § 1981 provides a remedy independent from Title VII is not affected by the argument herein or the result in Novotny. Unlike §1983 or §1985, §1981 does create substantive rights. See Novotny, supra at 377; Setser v. Novack Investment Co., 638 F.2d 1137, 1147 (8th Cir. 1981).

Administration, 425 U.S. 820 (1976) to hold that § 717 of the Act is the exclusive judicial remedy available to a federal employee alleging job-related discrimination. It has also been held, for example, that a narrowly tailored employee compensation scheme precludes suit under a general tort statute, e.g., United States v. Denko, 385 U.S. 149 (1966); Patterson v. United States, 359 U.S. 495 (1959), a carefully constructed venue statute in patent cases pre-empts a general venue statute, Stonite Products Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942), and the anti-trust provisions of the Robinson-Patman Act, 15 U.S.C. § 13a cannot be enforced through the framework of the Federal Alcohol Administration Act, 27 U.S.C. § 205, National Distributing Co. v. United States Treasury Dept., 620 F.2d 997 (D.C. Cir. 1980).

In sum, the conclusion as to lack of subject matter jurisdiction reached in

Novotny under § 1985 must also be applied to Patsy's § 1983 claim if the administrative procedures of Title VII are to serve their intended purpose. Thus far the courts which have addressed the issue unanimously support this result. Hall v. Board of County Commissioners, 509 F. Supp. 841, 848 (D. Md. 1981); Grate v. Grand Strand Water and Sewage Authority, [1981] 25 Empl. Prac. Dec. (CCH) ¶ 31,781 (D.S.C. 1981); LeBoeuf v. Ramsey, 503 F. Supp. 747, 754 (D. Mass. 1980); see also Meyerson v. Arizona, 507 F. Supp. 859, 864 (D. Ariz. 1981).

CONCLUSION

As a matter of ever-increasing importance, the exhaustion doctrine in § 1983 cases will undeniably require this Court's plenary review and guidance. The Board submits, however, that this petition should not present that occasion.

The present record in this case and its posture below reveal that important

jurisdictional issues and questions helpful if not essential to plenary review of the exhaustion doctrine have yet to be addressed. Accordingly, the Board submits that the petition should be denied or, if granted, that this Court vacate the decision below with instructions to dismiss petitioner's claims for lack of jurisdiction. Should review be accepted and the decision not vacated for jurisdictional reasons, the Board would respectfully suggest that this Court summarily affirm the Fifth Circuit's flexible rule at least insofar as it relies upon the absence of an ironclad rule to preclude it. Mandel v. Bradley, 432 U.S. 173, 175-177 (1977).

The "entire spectrum of conceivable constitutional violations . . ." can render ironclad answers to some questions arising under § 1983 "elusive" at best. Baker v. McCollan, 443 U.S. 137, 139-140 (1979). The "exhaustion of administrative

remedies" question belongs in that category unless "important interests . . . [are to be] sacrificed on [the] altar of [an expedient, ironclad rule]." (Pet. 37a-38a). However, wedded to "black letter" statements by this Court which suggest an "ironclad" rule, the lower federal courts have generally failed to develop a body of common law concerning exhaustion in §1983 cases. Of course, this Court could confirm the propriety of this gap in federal jurisprudence by granting the petition and summarily vacating the decision. However, for the reasons outlined by the Fifth Circuit, the Board most respectfully suggests that the decision below be summarily affirmed and the lower courts left to develop a body of § 1983 exhaustion law for possible aid to

this Court in providing subsequent plenary guidance.

Respectfully submitted,

JEFFREY H. KLINK
Mahoney Hadlow & Adams
800 Barnett Bank Building
100 Laura Street
P. O. Box 4099
Jacksonville, Florida
32201
Tel: (904) 354-1100

and

MITCHELL D. FRANKS
Department of Legal
Affairs
Office of the Attorney
General
Suite 1501
The Capitol
Tallahassee, Florida
32301
Tel: (904) 488-1573

Counsel for Respondent

APPENDIX

FLA. STAT. ANN. § 20.15 (West 1977)

DEPARTMENT OF EDUCATION

There is created a department of education.

(1) The head of the department of education is the state board of education composed of the governor and cabinet as specified in section 2, article IX of the state constitution. The governor is chairman of the board, and the commissioner of education is the secretary and executive officer and in the absence of the governor shall serve as chairman . . .

. . . .

(2)(a) The following divisions of the department of education are established:

. . .

(4) Division of Universities.

(3) The Board of Regents is the director of the Division of Universities pursuant to chapter 240. The directors of all other divisions shall be appointed by the commissioner subject to approval by the state board.

FLA. STAT. ANN. § 216.023 (West 1977) LEGISLATIVE BUDGET REQUESTS TO BE FURNISHED BY AGENCIES.

(1) The head of each agency, except the state courts system as defined in s. 25.382, shall submit a final legislative budget request to the Legislature and to the Governor, as chief budget officer of the state, in the form and manner prescribed in the budget instructions and at such time as specified by the Executive Office of the Governor, based on the agency's independent judgment of its needs. However, no state agency shall submit its final legislative budget request later than November 1 of each even-numbered year.

FLA. STAT. ANN. § 216.031 (West 1971)

BUDGETS FOR OPERATIONAL EXPENDITURES

The legislative budget requests submitted by the head of each state agency, showing the amounts requested for operational expenditures during the next biennium, shall contain the following:

(1) For each budget entity, a summary exhibit showing for each appropriate category, for each fund, 2 prior years' appropriations for general revenue, 1 prior year's actual and 1 current year's estimated expenditures, and the requested expenditures for each year of the next biennium. The total number of positions for the budget entity shall be shown for each fiscal year of data for which positions are authorized, fixed, or requested. However, the agency

budget request for the State University System shall be expressed in terms of the amounts for the various programs as prescribed in s. 240.271 and in terms of the specified appropriate categories, including the special units' budgets, prescribed in the prior appropriations act.

FLA. STAT. ANN. § 240.205 (West 1977)

BOARD OF REGENTS INCORPORATED

The Board of Regents is hereby created as a body corporate with all the powers of a body corporate for all the purposes created by, or that may exist under, the provisions of this chapter or laws amendatory hereof and shall:

(1) Have a corporate seal.

(2) Elect a corporate secretary.

(3) Have and employ a staff attorney and other authorized personnel.

(4) Have a power to contract and be contracted with, to sue and be sued, and to plead and be impleaded in all courts of law and equity.

(5) Receive donations.

(6) Make purchases of real and personal property and contract for the sale and disposal of same, but the title to all real property, however acquired, shall be vested in the

Board of Trustees of the Internal Improvement Trust Fund and shall be transferred and conveyed by it.

FLA STAT. § 240.209 (1979)

BOARD OF REGENTS; POWERS AND DUTIES.

(1) The Board of Regents is primarily responsible for adopting systemwide rules and policies; planning for the future needs of the State University System; planning the programmatic financial, and physical development of the system; reviewing and evaluating the instructional, research, and service programs at the universities; coordinating programs development among the universities; and monitoring the fiscal performance of the universities.

. . .

(3) The board shall:

. . .

(c) Review the legislative budget requests, including fixed capital outlay requests, from each

university, and subject to provisions of applicable law, present an aggregated budget for the State University System with recommendations for modifications to each university's budget request. The board shall provide to the individual universities fiscal policy guidelines, formats, and instructions for each budget request, developed in accordance with chapter 216 and s. 235.41.

FLA. STAT. § 240.2011 (1979)

STATE UNIVERSITY SYSTEM DEFINED.

The State University System shall consist of the following:

(1) The Board of Regents of the Division of Universities of the Department of Education, with a central office located in Leon County.

(2) The University of Florida, with a main campus located in Leon County.

(3) The Florida State University, with a main campus located in Leon County.

(4) The Florida Agricultural and Mechanical University, with a main campus located in Leon County.

(5) The University of South Florida, with a main campus located in Hillsborough County.

(6) The Florida Atlantic University,

with a main campus located in Palm Beach County.

(7) The University of West Florida, with a main campus located in Escambia County.

(8) The University of Central Florida, with a main campus located in Orange County.

(9) The University of North Florida, with a main campus located in Duval County.

(10) The Florida International University, with a main campus located in Dade County.

FLA. STAT. ANN. § 240.217 (West 1977)
BOARD EMPOWERED TO EXERCISE RIGHT OF EMINENT DOMAIN

Whenever it becomes necessary for the welfare and convenience of any of its institutions or divisions to acquire private property for the use of said institutions, and the same cannot be acquired by agreement satisfactory to the Board of Regents and the parties interested in, or the owners of, said private property, the Board of Regents may exercise the right of eminent domain, and proceed to condemn the property in the manner provided by chapter 73.

FLA. STAT. ANN. § 240.281 (West 1977)

DEPOSIT OF FUNDS RECEIVED BY INSTITUTIONS AND AGENCIES IN THE STATE UNIVERSITY SYSTEM

All funds received by any institution or agency in the State University System, from whatever source received and for whatever purpose, shall be deposited in the State Treasury subject to disbursement in such manner and for such purposes as the Legislature may by law provide. The following funds shall be exempt from the provisions of this section and, with the approval of the Board of Regents may be deposited outside of the State Treasury:

(1) Student deposits.

(2) Scholarship funds from private sources.

(3) Student loan funds.

(4) Contractor's bid deposits.

(5) Vending machine collections.

(6) Alumni association funds.

(7) Funds received from private sources as gifts, grants, bequests or donations.

(8) Such other funds as may be approved by the Board of Regents and the Executive Office of the Governor.

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No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGIA PATSY,

Petitioner,

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, a body corporate, for and on behalf of Florida International University,

Respondents.

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR CERTIORARI

CHARLES S. SIMS
(*Counsel of Record*)
BRUCE J. ENNIS, JR.
E. RICHARD LARSON
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

Counsel for Petitioner

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In the Supreme Court of the United States

October Term, 1980

No. 80-1874

Georgia Patsy, Petitioner

v.

Board of Regents of the State of Florida, a Body Corporate, for and on Behalf of Florida International University, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR CERTIORARI

Respondents oppose the petition for certiorari on three grounds: (1) the petition is premature (Opposition 9-11), (2) no real conflict exists between the judgment below and decisions of this Court, other courts of appeals, or Con-

gressional intent (Opp. 12-22), and (3) federal courts lack jurisdiction over petitioner's §1983 employment discrimination claims (Opp. 23-28). None of these arguments has merit.

I. THE PETITION IS NOT PREMATURE AND SQUARELY PRESENTS IMPORTANT QUESTIONS REQUIRING THIS COURT'S RESOLUTION

The central question presented by the petition is whether exhaustion of administrative remedies may ever be required of plaintiffs bringing otherwise ripe §1983 claims. That important question is squarely presented on the present record. No further proceedings on remand concerning the particular administrative remedies available to petition are necessary to answer it, or would be relevant. If Congress has commanded in §1983 that exhaustion may not be required regardless of the particular procedures

available, then that command is violated by the remand and further delay added to the two and one-half years petitioner has already waited for proceedings to begin on the merits of her case. Certiorari is appropriate now to decide whether or not exhaustion in §1983 cases may be required.

Although §1983 could not be used to challenge preliminary, provisional, or non-final decisions not yet effectuated and therefore not yet depriving or certain to deprive a plaintiff of rights secured by law (see Opp. 12 n.8), the complaint (whose allegations must be taken as true) plainly avers that petitioner has been rejected by the university for numerous employment openings because of

intentional discrimination.[1/]

1/ The complaint originally named the university as the defendant. The university moved to dismiss, arguing that it could not be sued under state law, citing Byron v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975). Record Excerpts ("R") 26, 32. The district court agreed, noting that the Board of Regents were the proper defendants, since the Board was "the corporate body with the power and capacity to sue and be sued." Fla. Stat. §240.042 (1977). See R. 36. The complaint was amended accordingly to name the Board as the defendants. R.36. Therefore, contrary to respondents' argument (Opp. 11 n.7), the Regents are not sued under respondeat superior, but as the parties legally responsible under state law for the allegedly wrongful conduct. Compare Board of Regents v. Roth, 408 U.S. 564 (1972), Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978), all cases where university decisions concerning individuals were challenged against defendant Boards of Regents. Whether the respondents have "caused" or are legally responsible for the allegedly wrongful conduct remains to be decided on the merits after remand and poses no jurisdictional or other bar to this Court's resolution of the exhaustion questions timely posed in the petition. It should be noted, however, that the decision denying plaintiff (Footnote continued on following page)

II. THERE ARE CONFLICTS BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT, OTHER COURTS, AND CONGRESSIONAL INTENT

A. Respondents' conclusory statement (Opp. 12-13) that the Fifth Circuit's exhaustion requirement rests on reasons not considered by this Court or the circuit courts rejecting the requirement is incorrect, as the cases we have previously cited demonstrate (Pet. 12 n.5 and 13 n. 6).

B. The additional argument (Opp. 13-20) that the decision does not conflict with congressional intent is also erroneous, and is contradicted by defendants themselves, who correctly observe:

(Footnote continued from preceding page) the jobs she sought was discussed with and ratified by the Acting President of the University at a September 27, 1978 meeting. See Reply Br. of Appellant in the Fifth Circuit Court of Appeals, at 1-2.

> Congress chose to enact §1997e because of the perceived inability of the courts to require exhaustion in a context that clearly warranted it (Opp. 18.)

That is precisely the point. Congress plainly believed that courts could not require exhaustion in §1983 cases without additional legislation, and acted accordingly. That belief is controlling. See Cannon v. University of Chicago, 441 U.S. 667, 710-711 (1979) and cases previously cited (Pet. 32). If courts may require exhaustion in all §1983 cases, as the decision below holds, then §1997e was unnecessary and superfluous. Having enacted §1997e, Congress withdrew from the courts whatever interstitial "legislative" power they previously had to require exhaustion in §1983 cases, as Milwaukee v. Illinois, 49 U.S.L.W. 4445, 4447-9 (1981) and other cases previously

cited (Pet. 33-34) make clear. Respondents have pointedly failed to address the fatal impact the rule of those cases has on the Fifth Circuit's decision below. Instead, their argument (Opp. 18-19) rests wholly on the same policy considerations addressed by Congress in enacting §1997e.

C. The argument (Opp. 20-22) that the decision below does not conflict with McNeese does not rebut the points made in the petition (at 35-43). We add only that it is undisputed that the latter stages of the administrative process are staffed by state officials outside the university system, who (like the officials in McNeese) are not able to grant relief even if they were to find for petitioner. See Pet. 39, 40.

III. NO JURISDICTIONAL OBSTACLES PRECLUDE GRANTING THE WRIT

Respondents raise three arguments that assertedly require vacation of the decision below for lack of jurisdiction. (Opp. 23-38). None has merit.

A. Even if applied to respondents,[2/] the Eleventh Amendment at most bars dam-

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2/ This Court has held that the Eleventh Amendment bars damage claims "which must be paid from public funds in the state treasury". Edelman v. Jordan, 415 U.S. 651, 663 (1974), Quern v. Jordan, 440 U.S. 332, 337 (1979). The statutes appended to the Opposition demonstrate that although most funds of institutions in the state university system "shall be deposited in the State Treasury subject to disbursement in such manner and for such purposes as the Legislature may by law provide", designated University funds are "exempt" from state control and "may be deposited outside of the State Treasury". See Fla. Stat. Ann. §240.281 (West 1977), reproduced at Opp. A-13. A judgment paid from such funds deposited "outside of the State Treasury" (derived from alumni association funds, donations, gifts, and other sources specified in §240.281) would not be paid "from public funds in the state treasury" and therefore is not barred by the Eleventh Amendment under the plain language of Edelman and Quern, supra.

ages relief in this case. See R. 34. Because the complaint alternatively seeks injunctive relief, the Eleventh Amendment does not bar this suit. Quern v. Jordan, 440 U.S. 332 (1979); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Board of Curators v. Horowitz, supra; Regents of the University of California v. Bakke, supra; Board of Regents v. Tomanio, 446 U.S. 478 (1980).

B. Respondents also contend that Boards of Regents are not "persons" within the meaning of §1983. However, that argument has been explicitly or implicitly rejected in several decisions of this Court. See Regents of the University of California v. Bakke, supra (§1983 suit against a state Board of Regents); Supreme Court of Virginia v. Consumers Union, 446 U.S. at 737 n.16 (noting that question whether Virginia court is "person" was

not before court); Board of Curators v. Horowitz, supra; Board of Regents v. Roth, supra; Board of Regents v. Tommanio, supra.[3/]

C. Finally, respondents oppose certiorari on the ground that petitioner is somehow impermissibly bypassing the requirements of Title VII. (Opp. 25-28).

3/ Lower courts have also concluded that states or state entities may be "persons" within the meaning of §1983. See, e.g., Marrapese v. Rhode Island, 500 F.Supp. 1207, 1210-1211; Beck v. California, 479 F.Supp. 392, 396 (C.D. Cal. 1979); Savage v. Pennsylvania, 475 F.Supp. 524, 529-31 (E.D. Pa. 1979). Roth v. Board of Regents, 310 F.Supp. 972, 974 (W.D. Wis. 1970), rev'd on other grounds 408 U.S. 564 (1972). In any event, as Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 297 (1977) makes clear, the question does not preclude this Court from reaching the questions presented here. See also Supreme Court of Virginia v. Consumers Union, supra (question whether Supreme Court is a person not jurisdictional) (semble).

That argument was not raised below, should not be considered here,[4] and is incorrect. Purposeful employment discrimination by public employers was actionable under §1983 both before and after enactment of Title VII and its application to governmental employees.[5] Petitioner has not relied on §1983 to assert rights created by Title VII, but has sued to enforce rights secured by the Fourteenth Amendment. Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979), is therefore inapposite. Compare Opp. 25-26.

4/ The question whether §1983 is available in light of Title VII is the kind of question the Court has held not jurisdictional. Lake Country Estates v. Tahoe Planning Agency, 440 U.S. 391, 398 (1979); Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 279, 281 (1977).

5/ See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 309 n.15; Johnson v. City of Cincinnati, 450 F.2d

(Footnote continued on following page)

CONCLUSION

For these reasons, and the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari, and should summarily reverse the judgment below. In the alternative, certiorari should be granted, and the Court should set the case for full argument or vacate the judgment below and remand for reconsideration in light of 42 U.S.C. §1997e.

(Footnote continued from preceding page) 796 (6th Cir. 1971). Cf. Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). See H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 18-19 (1971) (emphasizing preservation of all existing rights); 118 Cong. Rec. S1450 et seq., S1523-26, and 1793-97 (daily ed. Feb. 8, 9, and 15, 1972) (debate on and defeat of amendment to make Title VII exclusive employment discrimination remedy).

Respectfully submitted,

CHARLES S. SIMS, Counsel of
Record
BRUCE J. ENNIS
E. RICHARD LARSON

American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioner

July 28, 1981

No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

AVIAM SOIFER
23 Irving Street
Cambridge, MA 02138
(617) 547-2865

STEVEN R. SHAPIRO
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

JOEL M. GORA
645 West End Avenue
New York, New York 10025
(212) 874-5791

CHARLES S. SIMS
Counsel of Record
BRUCE J. ENNIS, JR.
E. RICHARD LARSON
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether petitioner can be required to exhaust administrative remedies despite this Court's consistent and repeated holdings that exhaustion is not required in cases under §1983, continued congressional recognition and approval of those holdings, and the absence of any historical basis to support a departure from this Court's accurate construction of §1983?

2. Whether the recent enactment of the Civil Rights of Institutionalized Persons Act in 1980, 42 U.S.C. §1997e, which explicitly authorizes required exhaustion of administrative remedies in §1983 cases but only in narrow and specified circumstances not present here, precludes judicial imposition of a different or broader exhaustion requirement in other circumstances where Congress has not seen fit to require exhaustion?

3. Whether the Fifth Circuit erred in requiring consideration of administrative

exhaustion where (a) defendants failed to demonstrate that such remedies were assured, plain, speedy, and effective, and at least as protective of petitioner's interests as the analogous procedures of 42 U.S.C. §1997e, and (b) the administrative agency to which plaintiff would be remanded ultimately was not empowered to award either injunctive relief or the damages petitioner sought?

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OPINIONS BELOW

The opinion of the Court of Appeals en banc (Appendix to the Petition for Certiorari, hereinafter "PA," at 1a-122a) is reported at 634 F.2d 900. The vacated opinion of the Fifth Circuit panel (PA 123a-126a) is reported at 612 F.2d 946. The summary order of the district court dismissing the complaint for failure to exhaust administrative remedies (PA 127a-128a) is not reported.

JURISDICTION

The judgment of the Court of Appeals en banc (PA 129a-131a) was entered on January 22, 1981. The petition for a writ of certiorari was filed on May 7, 1981, the time for filing having been extended on April 3 to May 7, 1981 by Justice Powell, and was granted on October 5, 1981. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1983 of Title 42 of the United States Code, reproduced in the Petition for Certiorari at 2.

The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980), section 7, codified at 42 U.S.C. §1997e (Supp. 1981), reproduced at PA 132a.

STATEMENT OF THE CASE

1. On February 7, 1979, Georgia Patsy filed a complaint in the United States District Court for the Southern District of Florida, alleging that the defendant state university, her employer, had solely because of her race (Caucasian) and sex unlawfully denied her employment opportunities for which she was well qualified. Joint Appendix ("JA") 29.[1/] In plaintiff's amended complaint (which must be assumed to be true for present purposes), she alleged that despite

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1/ All references are to the amended complaint, filed on April 19, 1979.

her qualifications -- a Bachelor's degree from the University of Miami, a Masters degree from Florida International University (her employer), and continuing teaching experience in the Dade County, Florida adult education program -- and despite the uniformly excellent evaluation of her work by supervisors and the former President of FIU, she had been rejected for more than thirteen named positions for which she had applied and was well qualified during her six years of employment at FIU. JA 31-33. Plaintiff alleged that the University had unlawfully filled positions through intentional discrimination on the basis of race and sex, despite the acknowledgement as early as 1972 by FIU President Charles E. Perry that plaintiff was employed in a position inferior to that which her qualifications merited. JA 32-35.[2/] Injunctive relief and damages were

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2/ Plaintiff appended to the complaint a variety
(footnote continued on following page)

sought pursuant to 42 U.S.C. §1983.[3/] JA 38-39.

The Board of Regents moved to dismiss the complaint because, inter alia, plaintiff had failed to exhaust available administrative remedies. JA 58, 65. Plaintiff opposed the motion, relying on this Court's consistent holdings that administrative exhaustion is not required. JA 86. The district court on July 9, 1979 summarily granted the motion to dismiss for failure to exhaust administrative

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of exhibits consisting of the letter from former FIU President Charles E. Perry acknowledging that her "background qualifies her for a higher position;" faculty attestations to her "outstanding" contributions and competence; highly laudatory performance appraisals since 1973; and evidence of employment discrimination at FIU. JA 41-57.

3/ The complaint sought promotion to the next available position consistent with those plaintiff had previously applied for and for which she was qualified, or in the alternative actual and exemplary damages (JA 39). Of course, Fed.R.Civ.P. 54(c) makes plain her entitlement to seek injunctive relief and damages if she is otherwise entitled to such relief. See generally 6 J. Moore Federal Practice, ¶54.60, at 1212, and ¶ 54.62 at 1264, 1268-69 71 (2d ed. 1981). See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 409, 423-25 (1975).

remedies. PA 127a.[4/]

2. On appeal, the Fifth Circuit (Godbold, J.) reversed, finding an exhaustion requirement barred by this Court's cases, and remanded for further proceedings, including consideration of the Board's additional arguments that it was not a "person" under §1983 and that the action was barred by the Eleventh Amendment. PA 126a.

3. The Fifth Circuit granted the Board's motion for rehearing en banc, and nearly a year later reversed the panel by a vote of 17-7 and upheld the district court's

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4/ Although the record before the district court contained only a conclusory allegation in the complaint that "plaintiff has no plain nor adequate remedy at law to redress the wrongs" complained of (JA 37), defendant's attorneys knew, and the Fifth Circuit was later advised, that plaintiff's attorneys had met unsuccessfully in September, 1978 for an hour with the acting President of FIU and FIU's attorney concerning plaintiff's employment situation "with a view toward resolving the problem without having to resort to the Courts for relief." C.A. Reply Brief of Appellant 1 (Nov. 30, 1979). The participants at that meeting were FIU attorney Bill Glenn, FIU Acting President Dr. Joseph Olander and Georgia Patsy's attorneys, Denis Dean and now-United States District Judge Eugene P. Spellman.

conclusion that §1983 plaintiffs are required to exhaust administrative remedies. PA 1a-120a.

Writing for the majority, Judge Roney dismissed as dicta this Court's repeated statements that §1983 plaintiffs need not exhaust administrative remedies. Judge Roney canvassed the policy reasons in favor of and against an exhaustion requirement (PA 37a-48a), and concluded, largely for reasons of efficiency and comity, that exhaustion would henceforth be required in all §1983 cases under the general standards set forth in McKart v. United States, 395 U.S. 185 (1969) (PA 49a-52a). The majority only cursorily addressed the question whether the 42nd Congress intended to require exhaustion when it enacted what is now §1983 (PA 38a-40a), and failed to inquire whether recent congressional enactment of a limited and carefully tailored exhaustion requirement for a specific category of §1983 cases, §7 of the Civil Rights of

Institutionalized Persons Act (of which the court was apparently unaware), was inconsistent with judicial imposition of a different and far broader exhaustion requirement. Finding the record inadequate to determine "whether state administrative remedies were adequate in the context of the rights asserted by plaintiff" (PA 55a), the majority remanded for such a determination and for dismissal without prejudice if the district court found that plaintiff had bypassed adequate remedies. Id.

Seven judges joined in three dissenting opinions. Judge Rubin found Wilwording v. Swenson, 404 U.S. 249 (1971), an insurmountable obstacle to an exhaustion requirement. PA 57a-69a.[5/] He distinguished the federal administrative remedies relied on as a model by the majority from the myriad state procedures for which exhaustion would now be

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5/ Judge Kravitch also made this point in a brief dissent. PA 69a.

required, noting that "the Congress that enacted §1983 did not have the faith in state administrative remedies that later Congresses understandably had in the federal administrative remedies of their own creation." PA 65a-66a.

Judge Hatchett found that §1983 left to plaintiffs the decision whether the state or federal remedy would best enforce the rights at stake. Congress, he found, had never intended to require exhaustion. He emphasized the "time-consuming procedural nightmare" the majority opinion created, the inadequacy of the typical state administrative process for awarding attorney's fees and maintaining class actions, and the specific inadequacies of the procedure available to petitioner in this case. PA 110a-115a.

SUMMARY OF ARGUMENT

IA. This Court has consistently held and frequently reaffirmed that exhaustion of

administrative remedies is not generally required in §1983 cases. Carter v. Stanton, 405 U.S. 669 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963). Affirmance of the decision below would require direct overruling of these clear, consistent precedents. None of the criteria this Court has previously used to justify direct overruling of precedent applies to this case.

IB. The text and legislative history of §1983 also bar an administrative exhaustion requirement. Contemporaneous legislative history provides no evidence that Congress intended to require exhaustion, and demonstrates that an exhaustion requirement would have been inconsistent with congressional intent to provide a prompt federal judicial forum for fact-finding and adjudication of claims authorized by §1983.

IC. Congressional action subsequent to 1871 demonstrates a consistent understanding that §1983 contains no exhaustion requirement. Congress has acted consistently to require exhaustion by statute when it has intended that result. The Court should not require exhaustion unless it finds that Congress clearly intended to do so, a finding which for reasons set forth in Points I and II cannot be made here. Amendment in 1979 of §1983 to include the District of Columbia within its reach, without any criticism of this Court's consistent non-exhaustion construction of §1983, confirms Congress' approval of the non-exhaustion rule. United States v. Rutherford, 442 U.S. 544 (1979).

II. When it enacted a specific exhaustion requirement in the Civil Rights for Institutionalized Persons Act in 1980, Congress made clear that it was carving out a narrow exception to a general rule that §1983 plaintiffs could not be required to exhaust state

or local administrative remedies. After careful study of the impact of §1983 filings on federal courts, the effects of the non-exhaustion rule on the remedial goals which §1983 was intended to serve, and various countervailing interests, Congress acted to authorize exhaustion only in narrow and specified circumstances not present here. Judicial imposition of a different or broader exhaustion requirement is therefore inconsistent with clear congressional intent and recent congressional action. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Northwest Airlines, Inc. v. Transport Workers, 67 L.Ed.2d 750 (1981).

III. The decision to impose an exhaustion requirement and its design and scope implicate critical policy questions "for legislative judgment, not judicial inference." United States v. Rutherford, 442 U.S. at 559; Diamond v. Chakrabarty, 447 U.S. 303 (1980). Moreover, the exhaustion requirement recently

imposed for certain §1983 cases brought by prisoners demonstrates that were Congress to require exhaustion for other §1983 claims and plaintiffs, it would likely impose an exhaustion requirement much more limited in extent and scope than the general standard imposed by the Fifth Circuit. The Fifth Circuit's approach, in the context of thousands of differing state and local administrative agencies, will lead to burdensome litigation over collateral issues.

IV. Finally, the administrative procedures available graphically illustrate why Congress has not required exhaustion in §1983 cases generally. Those procedures are inadequate under the standards this Court has articulated. The administrative process culminates with an administrative body which lacks the authority to enforce its own rulings or grant relief without recourse to state court, and is thus inadequate under McNeese v. Board of Education. In addition, the administrative

process is procedurally and remedially inadequate, slow, confusing, and in this case futile, and therefore need not have been pursued in any event.

ARGUMENT

I. THIS COURT'S CONSISTENT DECISIONS, AND LEGISLATIVE HISTORY FROM 1871 TO THE PRESENT, CONFIRM THAT SECTION 1983 PLAINTIFFS ARE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES

This Court has repeatedly held that exhaustion of administrative remedies by federal plaintiffs in §1983 cases is not required.[6/] A pattern of statutory construction so frequently and consistently reaffirmed and reapplied by this Court and accepted by the Congress may not be judicially overturned absent narrow circumstances not present here. Maine v. Thiboutot, 448 U.S. 1, 8 (1979); Monroe v. Pape, 367 U.S. 167, 185 (1961); Runyon v. McCrary, 427 U.S. 160, 173-75 (1976). Nor is any basis for affirmance of the decision below to be found in the text or legislative history of the Civil Rights Act of 1871, which to the

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6/ For convenience, "exhaustion" will hereafter be used to refer to required exhaustion of state administrative remedies under §1983.

contrary strongly support the non-exhaustion rule. Congressional actions subsequent to this Court's non-exhaustion holding in McNeese v. Board of Education, 373 U.S. 668 (1963) demonstrate that Congress approves of the rule and has not questioned or challenged it.[7/]

A. This Court's Consistent Decisions Bar An Exhaustion Requirement

1. The dismissal below directly contradicts consistent Supreme Court decisions

The en banc majority's conclusion that the rule against administrative exhaustion has not been settled by this Court is plainly wrong. Five of this Court's §1983 decisions have squarely announced and relied

7/ Under existing law a plaintiff under certain circumstances might be required to allege the inadequacy of state remedies as an element of his claim of a deprivation of the procedural protections of due process of law. See, e.g., Parratt v. Taylor, U.S., 68 L.Ed. 2d 420 (1981). The application or scope of that principle is not at issue in this case.

on the rule.[8/] These holdings have repeatedly been approved in this Court's *dicta* as well.[9/] Each member of this Court

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8/ Carter v. Stanton, 405 U.S. 669, 671 (1972) (unanimous holding that exhaustion of state administrative remedies not required in challenge to denial of welfare benefits on statutory and constitutional grounds); Wilwording v. Swenson, 404 U.S. 249, 251 (1971)(8-1 holding that exhaustion of state administrative remedies not required in prisoners' challenge to conditions of confinement, whether or not exhaustion would be futile); Houghton v. Shafer, 392 U.S. 639, 640 (1968)(unanimous holding that exhaustion of state administrative remedies not required in prisoners' challenge to seizure of legal materials by prison authorities, whether or not exhaustion would be futile); Damico v. California, 389 U.S. 416, 417 (1967)(8-1 holding that exhaustion of federally-imposed state administrative remedies not required in constitutional challenge to denial of welfare benefits); McNeese v. Board of Education, 373 U.S. 668 (1963)(8-1 holding that exhaustion of state administrative remedies not required in school desegregation case, whether or not exhaustion would be futile).

9/ FAIR v. McNary, No. 80-427 (Dec. 1, 1981) Slip. op. at 3-5; Allen v. McCurry, 449 U.S. 90, 104 n.24 (1981)("federal habeas corpus is bounded by a requirement of exhaustion of state remedies ... which have no counterparts in §1983"); Ellis v. Dyson, 421 U.S. 426, 432-33 (1975)("Exhaustion of state judicial or administrative remedies in Steffel was ruled not to be necessary, for we have long held that an action under §1983 is free of that requirement") Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on

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has agreed that the Court's decisions have firmly established the rule.[10/] Far from being reached in "an almost off the cuff manner",[11/] those holdings were the product

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42 U.S.C. §1983 ... we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"); Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974); Allee v. Medrano, 416 U.S. 802, 814 (1974); Preiser v. Rodriguez, 411 U.S. 475, 492-93 n.10, 494 (1973)("Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustin of state remedies.") See also Burrell v. McCray, 432 U.S. 471 (1976)(White, J., dissenting and Stevens, J., concurring).

10/ See, e.g., FAIR v. McNary, slip op. at 4; id. at 20 (concurring opinion); Allen v. McCurry, 449 U.S. at 104 n.24 (1981); Parratt v. Taylor, U.S., , (1981), 68 L.Ed.2d 420, 440 n.13 (Powell, J., concurring in the result); Burrell v. McCray, 426 U.S. 471 (1976)(White, J., dissenting); id., (Stevens, J., concurring).

11/ City of Columbus v. Leonard, 443 U.S. 905 (1979)(Rehnquist, J., dissenting).

of reasoned decisions, after consideration of historical materials and policy arguments.[12] They were tested against careful but ultimately unpersuasive dissents,[13] which urged the very arguments made by the court below and the Board here.[14]

12/ See, e.g., Brief for the ACLU in McNeese v. Board of Education, supra; Brief for the Appellee in Damico v. California, supra; and the two Briefs for the Appellees in Carter v. Stanton, supra. The Carter briefs rely heavily on Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969)(Friendly, J.)(urging exhaustion in §1983 cases). After oral argument in Carter on November 8, 1971, and while that case was under consideration, this Court was carefully considering Eisen. See Lynch v. Household Finance, 405 U.S. 538, 542 (1972).

13/ See, e.g., McNeese v. Board of Education, 373 U.S. 668, 676 (Harlan, J.)(exhaustion of administrative remedies); Damico v. California, 389 U.S. 416, 417 (exhaustion of federally-mandated remedies). See also Eisen v. Eastman, supra n.12.

14/ Although the court of appeals attempted to demonstrate that the repeated refusals to require exhaustion were dicta because exhaustion might have been futile, this Court rested its decisions squarely on holdings that exhaustion was not required, as the separate dissenting opinions of Judges Rubin and Hatchett demonstrate. PA 57a-62a, 71a-102a. At the least, the general rule against required exhaustion was an independent ground of the decisions and as such cannot be disregarded as dicta. See United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); see also Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949).

In contrast to this extensive line of cases, the Fifth Circuit relied solely on Gibson v. Berryhill, 411 U.S. 564 (1973) and its descendent, Barry v. Barchi, 443 U.S. 55 (1979). That reliance is misplaced. Gibson's suggestion that an exception to the non-exhaustion rule might exist where

> a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding

does not apply to this case. 411 U.S. at 574-75. No proceedings of any sort have been "brought by the state" or are "pending in one of its own agencies". Petitioner is complaining of harm already suffered, not harm yet to occur.[15/] In any event,

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15/ The question reserved in Gibson v. Berryhill may be before the Court this term in Middlesex County Ethics Committee v. Garden State Bar Association, No. 81-460, cert. granted, 50 U.S.L.W. 3333 (Nov. 2, 1981).

of course, the general rule barring exhaustion was restated after Gibson in FAIR v. McNary, Allen v. McCurry, Ellis v. Dyson, Wolff v. McDonnell, and Steffel v. Thompson.

Just last Term, this Court relied on the non-exhaustion rule in Board of Regents v. Tomanio, 446 U.S. 478 (1980). There, the Court held that New York could refuse to toll a statute of limitations pending exhaustion even though individuals who had chosen to rely on state remedies might still be involved in the administrative process by the end of the statute of limitations period, and would consequently be compelled to file a protective lawsuit to preserve a §1983 action. The Court reasoned that a federal rule tolling state limitations rules pending exhaustion was appropriate only where Congress has required "previous resort to state proceedings," 446 U.S. at 490, not where Congress has created an

action "separate and independent" from "other available" state remedies, as in §1983. 446 U.S. at 491. Tomanio itself concerned judicial exhaustion, but the Court's reasoning necessarily applies with equal force to the question of administrative exhaustion.

In light of the Court's consistent adherence to the non-exhaustion rule, and its reliance on the rule to answer other questions under §1983, affirmance of the decision below would require a departure from stare decisis which is unwarranted under the governing factors.

2. This case presents no justification for abandoning the settled non-exhaustion rule

The doctrine of stare decisis reflects the Court's reluctance to overrule its prior holdings even though other rulings might currently seem more attractive. Runyon v. McCrary, 427 U.S. at 174-75 & n.12; Monell v. Department of Social Services,

436 U.S. 658, 695-701 (1978); Monroe v. Pape, 365 U.S. at 192 (Harlan, J., concurring). The doctrine applies with special force in cases of statutory construction, because Congress may at any time correct perceived judicial misinterpretations. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736-37 (1977); Edelman v. Jordan, 415 U.S. 658, 695-701 (1974); Monroe v. Pape, 365 U.S. at 185. The Court has never settled on a definitive formula for determining when a holding may be overruled, but Monell identified four factors to be considered: (1) whether overruling would contradict congressional intent; (2) whether the prior holdings in question were themselves a departure from previous decisions; (3) whether overruling would frustrate legitimate reliance placed on the prior holdings; and (4) whether the prior holdings had misconstrued the statute's meaning. 436

U.S. at 696-701.[16/] None of these factors justifies overruling the frequently reaffirmed non-exhaustion rule.

First, even if the enactment of the Civil Rights of Institutionalized Persons Act were not dispositive of this case, the limited exhaustion requirement adopted and the legislative history demonstrate conclusively that Congress knew of and agreed with the general non-exhaustion rule and was unwilling to go beyond a narrow exception to the rule created to govern prisoner claims. See generally infra Point II.[17/]

16/ With respect to the last factor, the Monell Court did not decide whether the prior holdings had to appear wrong "beyond doubt," as advocated by Justice Harlan in Monroe v. Pape and by Justice Rehnquist dissenting in Monell, but found that test to have been satisfied in any event. 436 U.S. at 700-01.

17/ See also, e.g., 124 Cong. Rec. H. 7481 (daily ed. July 28, 1978)(remarks of Rep. Wiggins with regard to H.R. 9400, the predecessor to Pub.L. No. 96-247, passed by the House in the 95th Congress): (footnote continued on following page)

Explicit congressional knowledge and approval of an unbroken twenty-year line of cases argues powerfully against now overruling them. Maine v. Thiboutot, 448 U.S. 1, 8 (1979); United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979); Runyon v. McCrary; 427 U.S. at 173-75; Monell v. Department of

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> [I]t is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action...[S]ome of us have felt that the requirement of exhaustion of remedies would be desirable in the case of §1983 actions, but for various reasons it has been impossible to implement this requirement. The bill, however, makes a modest approach at an exhaustion of remedies requirement.

Id. Rep. Ertel similarly stated:

> [U]nder 1983 a State prisoner can come directly into Federal court, file his petition with no notification to the State whatsoever, and the Federal Court must take jurisdiction.

Id. at H 4624. Assistant Attorney General Drew S. Days testified to the same effect in the House hearings. See Hearings on H.R. 4239 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, 95th Cong., 1st and 2d Sess. 20 (1977-78). See also n.47, infra.

Social Services, 436 U.S. at 696-99; Flood v. Kuhn, 407 U.S. 258, 269-85 (1972); Laird v. Nelms, 406 U.S. 797, 802 (1972). See also Monroe v. Pape, 365 U.S. at 192 (Harlan, J., concurring). This legislative understanding and approval is of decisive importance even if this Court's earlier assessment of Congress' intent were doubtful or even erroneous, because

> the relevant inquiry is not what Congress correctly perceived as the then state of the law, but rather what its perception of the state of the law was.

Cannnon v. Univ. of Chicago, 441 U.S. 677, 711 (1979)(citation omitted). See also New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980).

Second, departure from stare decisis is unwarranted because the prior holdings at issue were not deviations from prior precedent. Before McNeese, the Court had never addressed the §1983 exhaustion ques-

tion.[18] Cf. Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 47 (1977).

Third, to overrule the Court's holdings rejecting exhaustion would frustrate the reliance placed on such holdings by plaintiffs, like petitioner, who may have selected what they believe to be the quicker, cheaper, and more effective remedy of a federal court action, in reliance on McNeese and its progeny.[19]

18/ In a contemporaneous decision, this Court unanimously rejected an administrative exhaustion requirement urged for a statute similar in form to §1983's predecessor, reasoning that it would add "a jurisdictional requirement which Congress alone had the power to establish." Clyde v. United States, 80 U.S. (13 Wall.) 35, 39 (1871).

19/ Failure to comply with the requirements of administrative remedies fully and in a timely manner could result in waiver of those remedies, and consequent bar to suit under §1983 for failure to exhaust. See McGee v. United States, 402, US 479, (1971). Cf. Wainwright v. Sykes, 433 U.S. 72 (1977). In addition, imposing a new exhaustion requirement on litigants already in federal court could lead in many cases to substantial delay with an adverse impact on the development of records.

Fourth, stare decisis effect should be accorded the Court's prior non-exhaustion decisions because it is "not beyond doubt" that such decisions misconstrued the meaning of the statute. See supra, at n.16. Indeed, as we now show, those decisions are clearly correct.[20/]

20/ Justice Powell, concurring in Monell, indicated that the degree to which an issue in question had been fully considered in prior cases might be another factor justifying overruling prior decisions. 436 U.S. at 709. Because the non-exhaustion holdings constitute a clear and uncontradicted line of precedent that was decided with full recognition of their implications, this factor also supports full application of stare decisis here. See supra, nn.12, 13.

B. The Text and Legislative History of Section 1983 Bar an Exhaustion Requirement

The Reconstruction civil rights statutes must be given the meaning dictated by their "origins and their language." Lynch v. Household Finance Corp., 405 U.S. 549; Maine v. Thiboutot, 448 U.S. at 14 (Powell, J., dissenting); see also Owen v. City of Independence, 445 U.S. 622, 635-37 (1980). The historical context in which §1983 was enacted confirms what the expansive sweep of the statutory language clearly commands: courts cannot interject exhaustion to delay or deny the independent right of action in federal court that Congress gave plaintiffs under §1983.[21/]

1. The text of section 1983 bars administrative exhaustion

It is not necessary to look beyond the words of §1983 to reject a general

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21/ References will generally be to §1983 where its predecessor, §1 of the Civil Rights Act of 1871, is discussed, except where pertinent differences are noted.

exhaustion requirement. See Maine v. Thiboutot, 448 U.S. at 6 n.4. The plain language of the statute, supported by consistent judicial interpretation, makes such a requirement impermissible:

> By the plain terms of §1983, two -- and only two -- allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, 446 U.S. 635, 640 (1980) (emphasis added). Compare Clyde v. United States, discussed supra, at n.18. Had Congress intended an exhaustion requirement as an additional condition for seeking §1983 relief, it would have so specified either then or subsequently, as Congress frequently has done in other civil rights

legislation.[22/]

2. Required administrative exhaustion would contradict Congress' intent in enacting section 1983

There is no evidence that the framers and supporters of the Civil Rights Act of 1871 intended to require exhaustion prior to a plaintiff's access to federal court to enforce a federal constitutional right. The very notion is anachronistic. Administrative agencies as we know them were an extremely recent innovation on the federal level -- the Department of Justice had just been organized in 1870, for example -- and virtually unknown in state government. Contemporaneous judicial precedent underscores the rejection of exhaustion as a

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22/ See infra, Point IC. In Preiser v. Rodriguez, the Court justified its prior refusal to require exhaustion of administrative remedies under §1983 on the ground that "in those cases brought pursuant to §1983, no other, more specific federal statute was involved that might have reflected a different congressional intent." 411 U.S. at 492 n.10. See also FAIR v. McNary, supra.

jurisdictional prerequisite, Clyde v. U.S., supra,[23] as well as the specific refusal to require exhaustion of state judicial remedies. Stanton v. Embrey, 93 U.S. 548, 554 (1877). See also Tennessee v. Davis, 100 U.S. 257, 266 (1880); Smyth v. Ames, 169 U.S. 466, 516-18 (1898); Ex Parte Young, 209 U.S. 123, 165-67 (1908).

Even if Congress had been aware of a judicially-imposed exhaustion principle, its application to §1983 cases would have been inconsistent with congressional intent to provide concurrent (not consecutive) federal and state jurisdiction over a substantial range of conduct.[24] The 42nd Congress

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23/ See n.18 supra.

24/ See, e.g., Congressional Globe, 42nd Cong., 1st Sess. (hereafter "Globe") 464 (Rep. Coburn); id. at 393 (Rep. Smith); id. at 691-92, 695 (Sen. Edmonds); Congressional Globe Appendix, 42nd Congress, 1st Sess. (hereafter "App.") 85 (Rep. Bingham). As these leading legislators emphasized, conduct which might constitute crimes or torts at state law might also violate the conspiracy provision of the 1871 Act, now 42 U.S.C. §1985(3). See, e.g., (footnote continued on following page)

clearly stated its intention to provide a prompt civil remedy in federal court to guarantee the enforcement of constitutional rights.[25/] Opponents decried the Act's

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(footnote continued from preceding page) Griffin v. Breckenridge, 403 U.S. 88 (1971); cf. United States v. Price, 383 U.S. 787 (1966)(1870 Act). It has not been seriously argued, however, that the remedies provided in §3 of the 1871 Act or its related criminal conspiracy counterparts are inoperative prior to exhaustion of state remedies.

25/ See, e.g., App. at 85 (Rep. Bingham)("Admitting that the States have concurrent power to enforce the Constitution within their respective limits, must we wait for their action? Are not laws preventive, as well as remedial....?"); Globe at 653 (Rep. Osborn)"[W]here is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts"); id. at 367-68 (Rep. Sheldon) ("It seems to me to be sufficient and at the same time proper to make a permanent law affording to every citizen a remedy in the United States courts for injuries to him in those rights declared and guaranteed by the Constitution..."); id. at 376 (Rep. Lowe)("[T]his bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired); id. at 389 (Rep. Elliott)("[H]as the Government of the United States the right, under the Constitution, to protect a citizen of the United States in the exercise of his vested rights ... [by] the assertion of immediate jurisdiction through its courts, without the appeal or agency of the State in which the citizen is domiciled?"). See also id. at 476 (Rep. Dawes); id. at 579 (Sen. Willson); id. at 691, 695 (Rep. Edmunds).

expansion of federal judicial power to enforce constitutional rights and what they perceived as the elimination of states' rights in a statute which "takes the whole question away from [the states] in the beginning."[26/] As this Court emphasized after studying the pertinent history, "[T]he very purpose of section 1983

26/ App. 86 (Rep. Storm). See also Globe 337 (Rep. Whitthorne)(complaining of "the destruction of local and convenient tribunals ... States and Commonwealths are to be destroyed for mere local disturbances or occasional personal trespasses upon the complaint of a single individual); App. 231 (Sen. Blair)("[I]t is contended that [the national government] can carry it out [i.e., enforcement of the Constitution] by its own officers and by supercedirg State officials"); App. 49-50 (Rep. Kerr)("a covert attempt to transfer another large portion of jurisdiction from State tribunals ... to those of the United States"); Globe 365 (Rep. Arthur)("it reaches out and draws within the circle of central power all the domestic, internal and local institutions ... and then asserts over them ... paramount control ... swallowing up the States and their institutions, tribunals, and functions ..."); Globe 361 (Rep. Swan)("the first section of this law ignores the State tribunals as unworthy to be trusted". See also App. 216 (Sen. Thurman); id. at 243 (Sen. Bayard); Globe 352 (Rep. Beck).

was to interpose the federal courts between the States and the people, as the guardians of the people's rights." Mitchum v. Foster, 407 U.S. 225, 239, 242 (1972). The Civil Rights Act of the post-Civil War era constituted "a vast transformation" in federalism, authorizing federal court intervention to protect citizens from unconstitutional action under color of state law.[27/]

The independence from state proceedings that Congress intended for §1983 is made clear from the remedial model Congress expressly relied on. With bitter irony, proponents of the Act patterned the expanded scope of jurisdiction on the 1793 and 1850

27/ See also Zwickler v. Koota, 389 U.S. 241, 247 (1967)(federal courts became "the primary and powerful reliances for vindicating every right given by the Constitution ... ," quoting Frankfurter and Landis, The Business of the Supreme Court: A Study In The Federal Judicial System 65)(emphasis in original). See generally H. Hyman, A More Perfect Union 245-81 (1973); S. Cutler, Judicial Power and Reconstruction Politics 114-60 (1968).

Fugitive Slave Acts and on the broad nationalism invoked by Justice Story in his Constitutional law treatise and in his decision in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), which had ousted the states from any role in guaranteeing personal liberty against the federal command to return fugitive slaves.[28/] Aware of their paradoxical reliance on Prigg, the proponents nevertheless expressly settled on the federal courts as their chosen weapon to provide realistic remedies for constitutional violations, against the arguments of opponents who helplessly criticized a revolution which, in their view, abandoned states' rights for centralized government.[29/]

28/ See, e.g., App. 69-71 (Rep. Shellabarger); id. at 85 (Rep. Bingham); Globe 375 (Rep. Lowe).

29/ The House sponsor of the 1871 Act, Rep. Shellabarger, described it as part of "this transcendent profusion of enactment in restraint of the

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The intention of the 42nd Congress to provide "a federal tribunal for fact findings" in §1983 cases has been apparent even to those who have taken the narrowest view of §1983. See, e.g., Monroe v. Pape, 365 U.S. at 247-48, 251-52 (Frankfurter, J., dissenting).30/ In 1871 and for long

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States and affirmative conferment of power on Congress." App. 69. The Speaker of the House, James G. Blaine, summarized the mood of Congress as one in which "everything which may be done by either nation or states may be better and more securely done by the nation." II Twenty Years of Congress 160 (1886). The debates indicate congressional intention to pass a "permanent" law, dealing not only with the present situation in the South but with violations of rights in the North, and the future. See, e.g., Globe 368 (Rep. Sheldon); App. 69-71 (Rep. Shellabarger); Globe 476 (Rep. Dawes); Globe 701 (Sen. Edmunds); App. 85 (Rep. Bingham). See generally Gillette, Retreat from Reconstruction (1979)(Republican hopes that the Act could be used, inter alia, against the Tweed Ring in New York).

30/ Justice Frankfurter criticized "the theory that the Reconstruction Congress could not have meant §1979 principally as a 'jursidictional' provision granting access to an original federal forum in lieu of the slower, more costly, more hazardous route of federal appeal from fact-finding state courts, [because it] forgets how important providing a federal trial court was among the several purposes of the Ku Klux Klan Act." 365 U.S. at 251 (emphasis added, citation omitted). See also Lane v. Wilson, 307 U.S. 268, 274-75 (1939).

afterward, special emphasis was placed on the importance of federal court fact finding in constitutional adjudication. That emphasis, of course, is inconsistent with leaving §1983 cases to administrative tribunals, which in other contexts are relied on precisely for their superior fact-finding expertise.[31/] Nor can it be argued that the

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31/ Justice Holmes, who had written essays supporting the Ku Klux Klan Act while a teacher at Harvard College in 1871, held in this Court's first administrative exhaustion case that administrative procedures could be required at the "legislative" stage when policy was neither set nor effectuated, Prentis v. Atlantic Coastline Co., 211 U.S. 210, 224-28 (1908), but not to delay constitutional challenges where policy was set and harm had occurred. Resort to genuine state "remedies" could not be required because "[a]ll their constitutional rights ... depend upon what the facts are found to be." Therefore plaintiffs could not "be forbidden to try those facts before a court of their own choosing ...." Id. at 228. See also Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923)(Holmes, J.)("Rules of comity and convenience must give way to constitutional rights"); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 29-30. Allen v. McCurry is not to the contrary. Allen did not disagree that §1983 generally secured to plaintiffs a choice of fact-finding forum, but held that litigants bound by previous judgments were precluded by a 1790 statute, now

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42nd Congress provided federal courts the power to renounce, without further congressional direction, the jurisdiction provided in the Act. That suggestion is refuted by its frequent references to Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).[32/] As Congress knew from those cases, actions cognizable in federal courts could be fully tried there.[33/]

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28 U.S.C. §1738, from making use of that choice. 66 L.Ed. 2d at 314-17. Similarly, because the exhaustion doctrine developed well after 1871, Congress cannot be said to have incorporated into §1983 a common law exhaustion principle. Cf. Owen v. City of Independence, 445 U.S. at 637.

32/ "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). See, e.g., Globe 459 (Rep. Coburn); Globe 476 (Rep. Dawes); Globe 691-92 (Rep. Edmunds).

33/ Of course, Congress might direct prior recourse to state remedies for a particular category of cases. E.g., FAIR v. McNary. Without substantial legislative direction to that effect, however, §1983 does not require it.

The 42nd Congress had three main purposes for §1983: compensation, deterrence, and emphasizing the importance that Constitutional rights have in our society. See, e.g., Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); Owen v. City of Independence, supra, 445 U.S. at 651; Carey v. Piphus, 435 U.S. 247, 266 (1978). In 1871 and still today those goals were uniquely characteristic of the judicial remedy in our jurisprudence. See Carlson v. Green, 446 U.S. 14 (1980). Available evidence uniformly suggests that in 1871 Congress intended to rely solely on courts for their implementation.

C. Recent Congressional Activity Demonstrates Consistent Understanding That Section 1983 Bars A Judicially-Imposed Exhaustion Requirement

The conclusion that exhaustion is not generally required in §1983 cases, based on this Court's consistent decisions and the text and legislative history of §1983, is confirmed by additional actions Congress has taken since Monroe v. Pape and McNeese v. Board of Education.

First, because Congress has so consistently and expressly exercised its power to prescribe the basic procedural scheme under which claims may be heard and to correct judicial imposition of exhaustion requirements by enacting statutory exhaustion requirements differing substantially from judge-made requirements, the Court should not imply an exhaustion requirement unless it finds that Congress intended to require one. See Transamerica Mortgage

Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979); Touche Ross & Co. v. Redington, 442 U.S. at 568; Cannon v. University of Chicago, 441 U.S. 677, 717 (1979)(Rehnquist, J., concurring); id. at 730 (Powell, J. dissenting). As shown in Point IB, the 42nd Congress cannot even conceivably be thought to have done so. To be sure, courts play a role in determining the parameters of exhaustion,[34/] but the initial question whether claims under a particular provision of law are generally subject to an exhaustion requirement at all is nearly uniformly answered by reference to statutory provisions or clear inferences therefrom.[35/]

34/ See, e.g., McKart v. United States, 395 U.S. 185 (1969); McGee v. United States, 402 U.S. 479 (1971); and Weinberger v. Salfi, 422 U.S. 749 (1975). See also n. 53 infra.

35/ Congress has specifically provided detailed schemes for exhaustion in numerous statutes. See, e.g., 7 U.S.C. §136d(4) (Federal Insecticide, Fungicide and Rodenticide Act); 7 U.S.C. §2023 (Food

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Second, the decision to make modern civil rights remedies independent of pre-existing remedies under the Reconstruction civil rights statutes reiterates and confirms congressional understanding that exhaustion was not required under those statutes.

The right of equal employment opportunity created by Title VII of the Civil Rights Act of 1964 was deliberately kept independent of the "avenues of relief" previously open and still available under post-Civil War statutes, Johnson v. Railway

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Stamp Program); 29 U.S.C. §817 (CETA); 33 U.S.C. §1369(b)(2)(Federal Water Pollution Control Act). Exhaustion for other claims under federal statutes which lack detailed exhaustion requirements is statutorily required under the Administrative Procedures Act, 5 U.S.C. §704. Congress consistently responded to judicial imposition of exhaustion by reasserting its legislative function, specifying exhaustion where and as Congress seeks to require it, substituting its own quite different views for those taken earlier by courts. See, e.g., Rosewell v. LaSalle National Bank, U.S. (1981), 67 L.Ed. 2d 464, (construing Tax Injunction Act, 28 U.S.C. §1341). Compare Ex Parte Royall, 112 U.S. 181 (1884) with 28 U.S.C. §2254(d).

Express Agency, 421 U.S. 454, 460 (1975), or otherwise, Alexander v. Gardner Denver Co., 415 U.S. 36, 47-49 (1974); Electrical Workers v. Robins & Myers, Inc., 429 U.S. 229 236-240 (1976). Although formally reserving the exhaustion question, 421 U.S. at 456 n.3, the Court's refusal in Johnson to toll the statute of limitations for §1981 claims pending exhaustion before the EEOC indicates that the policies favoring sub-judicial resolution of Reconstruction-era civil rights claims were out-weighed by the independence Congress sought for such claims from "elaborate and time-consuming procedures." Id. at 466.[36/] Congressional

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36/ Johnson's description of Title VII's procedures as "elaborate and time consuming" in comparison with the older remedy is highly significant in light of the fact that Title VII grants plaintiffs an absolute right to sue in federal court after 180 days. 42 U.S.C. §2000e-5(f). At the least, that time limit indicates congressional disapproval of any longer exhaustion requirement for cases of employment discrimination.

rejection in 1972 of Senator Hruska's proposal to make Title VII an exclusive judicial remedy, at the same time Congress extended Title VII to state and local employees, further confirms congressional understanding and approval of the functional independence of the post-Civil War remedies from Title VII and its administrative remedies.37/

Third, when Congress amended §1983 for the first time in a century in 1979 to add the District of Columbia to its coverage,38/ no complaint was heard concerning this Court's consistent and well-known holdings that administrative exhaustion could not be

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37/ See 118 Cong.Rec. 3371 (Sen. Williams); id. at 3370 (Sen. Javits). See also Alexander v. Gardner-Denver, 415 U.S. at 48 n.9. Courts have agreed that state and local employees may seek remedies for employment discrimination under both Title VII and §1983. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 309 n.15; Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1979). Compare Brown v. GSA, 425 U.S. 820 (1976)(federal employees).

38/ P.L. 96-170. 93 Stat. 1284.

required.[39] Once a judicial or administrative interpretation has been

> "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.

United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), quoting from Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-89 (1940).

39/ Congress' silence concerning the non-exhaustion rule is particularly significant here since the sole purpose of the amendment was to correct another of this Court's constructions of §1983, District of Columbia v. Carter, 409 U.S. 418 (1973), with which Congress did disagree. Opposition to the restrictive interpretation in that case, coupled with lack of any opposition to the broadly remedial interpretation in Monroe and McNeese, plainly gauges the intent of Congress. Indeed, the House Report stressed that the very purpose of §1983 was to "provid[e] a neutral Federal forum" for civil rights complaints. H.Rep. 96-548, 96th Cong., 1st Sess. (1979). See 125 Cong. Rec. at H 11175-77 (Nov. 27, 1979) and S 19100 (Dec. 18, 1979).

40/ See also Lorilland v. Pons, 434 U.S. 575, 580-81 (1978); United States v. Board of Commissioners of Sheffield County, 435 U.S. 110, 134-35 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975)

Although these expressions of congressional support establish the non-exhaustion rule's consistency with congressional intent beyond challenge,[41/] any remaining doubt has been laid to rest by recent legislation demonstrating firm congressional understanding and approval of the general rule, to which we now turn.

41/ Congress also demonstrated its intention that exhaustion of administrative remdies not be generally required in 1978, when it allowed complainants to choose between state administrative remedies and a §1983 lawsuit to resolve complaints concerning Title I of the Elementary and Secondary Education Act. See Education Amendments of 1978, 20 U.S.C. §2738 (Supp. 1979), and S.Rep. No. 856, 95th Cong., 2d Sess. 31 (1978).

II. THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT OF 1980, WHICH AUTHORIZES EXHAUSTION IN SECTION 1983 CASES ONLY IN NARROW AND SPECIFIED CIRCUMSTANCES CONCEDEDLY NOT PRESENT HERE, PRECLUDES JUDICIAL IMPOSITION OF A DIFFERENT OR BROADER EXHAUSTION REQUIREMENT

Congress, fully and expressly aware of the rule against exhaustion and the extent of §1983 filings by both prisoners and non-prisoners, recently enacted the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. §1997 (Supp. 1980). The Act allows exhaustion in §1983 cases only in circumstances not present here and in no way analogous to this case.[42/] The Fifth Circuit's across-the-board exhaustion requirement is inconsistent with that Act, and improperly usurped policy judgments Congress has reserved for itself.

This Court has stressed its obligation to identify and follow congressional intent when deciding a broad range of procedural

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42/ The pertinent provision is set forth at PA 132a.

questions, including the exhaustion question, arising under §1983.[43/] It is for Congress to decide whether to commit controversies regarding violations of federally secured rights under color of state law directly to courts, or to administrative agencies initially.[44/] Even for the most persuasive policy reasons, preconditions or additions may not be imposed on remedial systems where Congress does not intend them, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524 (1978), Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975), National Railroad Passenger Corp. v. National Association of Railroad

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43/ See, e.g., McNeese v. Board of Education, supra (exhaustion); Preiser v. Rodriguez, supra (agreeing that Congress did not require exhaustion in §1983 cases generally, but finding intent to require exhaustion under 28 U.S.C. §2254); Maine v. Thiboutot, 448 U.S. at 7-8 (scope of coverage).

44/ See generally L. Jaffe Judicial Control of Administrative Action 153-55 (1965).

Passengers, 414 U.S. 453, 458 (1974); where Congress has acted so as to displace courts from further activity, Northwest Airlines, Inc. v. Transport Workers, U.S. , 67 L. Ed. 2d 750, 766-67 (1981), Arizona v. California, 373 U.S. 546, 565-66 (1963); or where Congress has carved out an exception to a general remedial rule, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 269 (1975).

The Civil Rights of Institutionalized Persons Act authorizes courts to require exhaustion of "plain, speedy, and effective remedies," but only in §1983 actions brought "by an adult convicted of a crime confined in any jail, prison, or other correctional facility" and then only under narrow, specified conditions. Courts are directed not to dismiss cases pending exhaustion but only to continue them "for a period not to exceed ninety days." 42 U.S.C. §1997e(a)(1) (emphasis added). Even that

ninety day continuance may be imposed only if certain specified conditions are met. A court must find in a particular case that continuance would be "appropriate and in the interests of justice," 42 U.S.C. §1997e(a)(1). A case may not be continued unless the Attorney General certifies, or the court determines, that the available remedies are in "substantial compliance with the minimum acceptable standards promulgated [by the Attorney General] in accordance" with the Act. 42 U.S.C. §1997e(a)(2).[45/]

This extraordinarily detailed scheme demonstrates on its face congressional displacement of courts so far as required exhaustion under §1983 is concerned. The Act is inconsistent with judicial discretion to

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45/ Congress intended "that the court give 'great weight'" to a determination by the Attorney General to deny certification, see H.Rep. No. 96-80, 96th Cong., 1st Sess.25 (1979), and paid particular attention to specifying the standards grievance procedures must meet. See 42 U.S.C. §1997e(2)(A).

require exhaustion in other circumstances or under other conditions. The exhaustion provisions of the Act make sense, and were not superfluous, only if Congress believed that exhaustion could not be required prior to its enactment, and intended judicial adherence to the rule except insofar as provided for in the Act.

Indications of congressional intention are even clearer than the general comprehensiveness of the Act.[46/] The committee reports and debates are unusually clear and demonstrate Congress' decision to reject a general exhaustion requirement. Four major themes in the legislative history show knowledge and approval of the general rule against exhaustion.

First, Congress knew that under settled

46/ Compare Northwest Airlines, Inc. v. Transport Workers Union, supra, and Arizona v. California, supra, where the Court rested its decisions solely on the comprehensiveness of statutory provisions.

statutory construction federal courts were obliged to consider §1983 claims without requiring exhaustion, as respondents concede. See Br. in Opp. at 18. For example, Representative Butler, a member of the committee that first considered the provision, explained to the House that section 7

> provides that in certain cases a federal judge may require a State prisoner who has filed a §1983 petition to go back and exhaust his state grievance procedure ... Under existing law there is no requirement that a complainant first ask the prison system to help him. He can file his grievance directly in the federal court and his case has to be investigated by that court.

125 Cong. Rec. H3641 (daily ed. May 23, 1979) (emphasis added).47/

47/ See also supra, at n.17; 125 Cong. Rec. H3639 (Rep. McClory); id. at H3643 (Rep. Sawyer); id. at H3648 (Rep. Gudger). Representative Railsback admitted the subcommittee's initial "reluctance to resort to this [exhaustion] mechanism . . . as a possible encroachment on civil liberties; that is
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Second, in the course of hearings and debates in which the competing interests of state agencies and individual claimants were extensively debated,[48] Congress considered the extent of §1983 filings and their effect on the "evergrowing" caseload of federal courts.[49] Congress chose to address the caseload problem incrementally, by channelling what it knew to be the largest single category of §1983 complaints into a particular kind of grievance procedure meeting certain demanding standards.

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to say, in the full, unimpeded resort to 1983 . . ." Civil Rights of Institutionalized Persons: Hearings on H.R.10 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 96th Cong., 1st Sess. 26 (1979).

48/ See, e.g., 125 Cong. Rec. 4606 (daily ed. May 6, 1980) (Sen. Weicker); id. at 4608 (Sen. Thurmond).

49/ See, e.g., 125 Cong. Rec. H3639-40 (Rep. McClory) ("The northern district [of Illinois] was the fourth highest in the Nation in the number of 1983 cases filed . . . H.R. 10 would go a long way in helping those courts with their evergrowing caseload"); 125 Cong. Rec. H3637 (Rep. Butler); See also Hearings, supra n. 47, at 3 (Rep. Kastenmeier); id. at 4 (Rep. Railsback).

Third, Congress limited its exhaustion innovation to certain claims by adult prisoners in states that voluntarily adopted prison grievance procedures either certified by the Attorney General or in "substantial" compliance with his standards.[50] Lacking such compliance, even "plain, speedy and effective remedies" could be bypassed, §1997e(a)(2), and complaints "unrelated to conditions of confinement" could not in any event be continued. Conf. Rep. No. 96-897, 96th Cong., 2nd Sess. 15 (1980). Congress clearly intended that courts could not require other categories of §1983 plaintiffs to exhaust.[51]

50/ The Conference Report stressed "the voluntary aspect of the decision by a state or local agency to adopt a grievance procedure in substantial compliance with the model minimum standards." Conf. Rep. 96-897, 96th Cong., 2d Sess. 15 (1980). An earlier version of the bill, not adopted, would have permitted exhaustion under standards similar to those in McKart v. United States, 395 U.S. 185 (1969). See HR 5791, 95th Cong., 1st Sess. (1977).

51/ H.Rep. No. 96-80 at 23. See also Hearings,

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Fourth, as respondents again concede (Br. in Opp. at 15-16), exhaustion was held out as a carrot only to achieve other goals Congress thought important. See, e.g., H3637 (Rep. Drinan)(May 23, 1979). Congress sought to better prison conditions by stimulating the expansion of successful grievance mechanisms of which it had been fully informed. See H.Rep. 96-80 at 23, Conf. Rep. 96-897 at 16. Although Congress heard substantial debate concerning the states' interests in managing their own institutions, the legisla-

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supra n. 47, at 24-26. Adult prisoners were singled out because prisoner filings represented the largest and most burdensome category of §1983 complaints, since a disproportionate number were uncounselled, lengthy, handwritten, or frivolous. See, e.g., 125 Cong. Rec. H3639 (Rep. McClory). Some in Congress also thought it "fair ... that one standard be applied to penal inmates who have abused the law and ... [that another be applied to those] who have not offended society at all...."125 Cong. Rec. 4622 (May 6, 1980)(Sen. Bayh). The distinction between adult prisoners and other institutionalized persons ran through the debate and was especially relevant to the conditions under which the Attorney General would be authorized to sue state institutions on behalf of the United States. See 42 U.S.C. §1997a(a).

tive history discloses that Congress breached the previously unbroken non-exhaustion wall primarily out of desire to enhance enforcement of the civil rights of institutionalized prisoners and detainees in a particular manner, and not simply to yield primary jurisdiction over certain §1983 claims to state prisons.

These four themes from the legislative history show, to paraphrase this Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, supra, that "the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot [require exhaustion under section 1983]." 421 U.S. at 269.

In nearly every respect, Congress considered the interest in speedy access to federal courts to be far more in keeping with the original goals and continuing

importance of §1983 than the Fifth Circuit's McKart-type exhaustion rule. The Fifth Circuit requires all §1983 plaintiffs to exhaust "plain, speedy, and effective" remedies, in contrast to the congressional decision to require exhaustion of only certain convicted adult prisoners; contemplates dismissal where "plain, speedy and effective remedies" have not been exhausted, in contrast to the congressional decision prohibiting dismissal and permitting at most a ninety-day continuance; and fails to insist, as Congress has, on the quid pro quo of stringent procedural reform as the price for required exhaustion. The exhaustion requirement imposed by the Fifth Circuit, in sum, is both inconsistent with congressional intent and precluded by congressional action. Alyeska, supra; Northwest Airlines, supra; Chemeheuvi Tribe of Indians v. FPC, 420 U.S. 395, 410

(1975); Red Lion Broadcasting v. FCC, 395 U.S. 367, 380-81 (1969).[52/] This Court recently emphasized the deference owed to Congress when the judiciary is asked to alter remedial schemes carefully devised by Congress:

> We [have] a duty to "respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favor--ing one side or the other in matters of statutory construction" ...

Northwest Airlines v. Transport Workers Union, 67 L.Ed. 2d at 767 (citation omitted). The disparity between the balance Congress struck in 1980 and that struck by the Fifth Circuit demonstrates the wisdom of that approach.

52/ This Court recently vacated another Court of Appeals decision imposing an exhaustion requirement and remanding for reconsideration in light of 42 U.S.C. §1997e. Jenkins v. Brewer, U.S., 67 L.Ed. 2d 327 (1981).

III. CONSIDERATION OF AN ADMINISTRATIVE EXHAUSTION REQUIREMENT FOR SECTION 1983 CASES REQUIRES RESOLUTION OF POLICY QUESTIONS WHICH ARE FOR CONGRESS TO RESOLVE

Even if this Court were to depart from two decades of precedent and conclude that Congress has not foreclosed courts from requiring exhaustion, judicial imposition of such a requirement would nonetheless be inappropriate. In the context of the constitutional rights §1983 was designed to enforce, the decision to impose an exhaustion requirement and its design and scope would implicate critical questions of policy appropriately decided by Congress, not the judiciary. Moreover, only Congress, through legislation such as 42 U.S.C. §1997e, could impose an exhaustion requirement comprehensive and complete enough to avoid the uncertainties, inefficiencies, and enormous increase in litigation of collateral issues that would necessarily accompany

case-by-case judicial development of an exhaustion requirement for §1983 cases.

1. At the most general level, the policy factors bearing on whether to require exhaustion at all in the context of §1983 claims do not involve "the proper functioning of [a] particular administrative system Congress has constructed" that usually guides imposition of an exhaustion requirement. McGee v. United States, 402 U.S. 479, 483 n.6 (1971).[53/] Congress has neither designed an administrative system to remedy §1983 violations gen-

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53/ Although the McGee Court observed that it was "[un]tenable to say that the [exhaustion] doctrine is inappropriate when fashioned by judicial decision rather than specific Congressional command", 402 U.S. at 483 n.6, the Court was referring there to the scope and effect of an exhaustion requirement in Selective Service cases, not to the prior question whether to require exhaustion at all. Exhaustion in Selective Service cases is imposed by congressional command. Estep v. United States, 327 U.S. 114, 119 (1946); Falbo v. United States, 320 U.S. 549, 553-54 (1944). See 50 U.S.C. App. §460(b)(3)(Supp. 1981).

erally nor recognized or relied on existing systems in the states. To the contrary, Congress plainly thought a federal court action would provide the appropriate vehicle for enforcement of civil rights. See Point IB supra.

Because exhaustion in §1983 actions cannot be defended by recourse either to congressional intent or to inferences drawn from a congressionally-drawn administrative system, proponents of an exhaustion requirement have relied heavily on policy concerns. These, however, such as the heavy caseload of §1983 cases allegedly clogging federal courts, are insufficient and inappropriate reasons for federal courts to alter their congressionally-determined jurisdiction. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976) (right to removal in diversity cases may not be defeated because of district

court caseload); United Steelworkers v. Bouligny, 382 U.S. 145, 150-151 (1965).[54/]

The very vigor of the policy debate, moreover, and the superior institutional competence of the legislature to pursue it, suggest the importance of congressional resolution of the policies involved.[55/]

54/ Courts and commentators may, of course, appropriately bring such factors to the attention of Congress for its consideration. See, e.g., Parratt v. Taylor, U.S. (1981), 68 L.Ed. 2d 420, 440 n.13 (Powell, J., concurring in the result) (suggesting possible need for "revision" of §1983 filings); O'Connor, Trends in the Relationship Between the Federal and State Court Judge, 22 Wm. & M. L.Rev. 801, 810 (1981)("In view of the great caseload increase ... one would think that congressional action might be taken to limit the use of section 1983").

55/ Younger v. Harris, 401 U.S. 37 (1971) is not to the contrary. Although the Court has held that "considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. §1983", Board of Regents v. Tomanio, 446 U.S. at 492, citing Younger, the Younger doctrine is based on congressional policy dating back to 1793 and what the Court viewed as consistent judicial implementation of that policy. Id. at 43-44. See also FAIR v. McNary, supra. The Court has frequently read certain limitations into the expansive language (footnote continued on following page)

Even such basic questions as whether judicial or administrative procedures offer §1983 plaintiffs "the swiftest, least costly, and most reliable remedy" are vigorously argued.[56/] Serious disagreement rages over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their own narrow subject matter and idiosyncratic procedure,[57/]

(footnote continued from preceding page)
of §1983 where they were so firmly embedded in law that Congress would have expressly negated such limitations had it wished to abolish them. See Owen v. City of Independence, 445 U.S. at 637. An exhaustion requirement, however, cannot similarly be read into §1983. See Part IB, supra.

56/ Compare the views of Judges Rubin and Hatchett, dissenting below (634 F.2d 916, 925, PA 69a, 113a) with Moore v. City of East Cleveland, 431 U.S. at 529 (Burger, C.J., dissenting).

57/ Compare Whitman, Constitutional Torts, 79 U.Mich.L.Rev. 1, 23 (1980) with the en banc decision below (634 F.2d at 911, PA 42a-46a).

and whether the symbolic and institutional function of federal courts in defining, legitimizing, and enforcing constitutional claims outweighs the educational function that would follow routing such claims through state and local agencies.[58/] Also a matter of substantial disagreement is the question whether the present "free market" system, under which litigants have the option to exhaust if it appears cheaper, more efficient, and more likely to be effective, is more likely to induce creation of adequate remedies than a McKart-type standard under which plaintiffs have

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58/ Compare Carey v. Piphus, 435 U.S. 247, 266 (1978) and Davis v. Passman, 442 U.S. 228, 241 (1979) with the en banc decision below (634 F. 2d at 911-912, PA 46a-48a). See generally, Whitman, Constitutional Torts, supra, at 23. See also Jackson v. Virginia, 443 U.S. 307, 321-324 (1979), and Rose v. Mitchell, 443 U.S. 545, 559-564 (1979)(declining to extend Stone v. Powell, 428 U.S. 465 (1976) in light of special role post-Civil War Congress conferred on federal courts for determining most consitutional claims, even where states have afforded "full and fair hearing" for such claims).

no initial choice of forum.[59/]

Each of the considerations supporting an exhaustion requirement, in sum, is subject to substantial countervailing considerations. The validity of the underlying assumptions and the potential impact of exhaustion upon diverse interests can only be determined by "the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." Diamond v. Chakrabarty, 447 U.S. 303, 316-18 (1980); see also United States v. Rutherford, 442 U.S. at 552; TVA v. Hill, 437 U.S. at 194-95; United Steelworkers v. Bouligny, 382 U.S. at 150, 153.

2. Beyond the policy issues that must

59/ Compare HR 5791 (95th Cong., 1st Sess.) (proposal for exhaustion under McKart standard; not enacted) with HR 9400 (95th Cong., 1st Sess.) and 42 U.S.C. §1997e (continuance not to exceed ninety days for certified procedures meeting federal standards). Congressional rejection of the proposal that prisoners be required to exhaust state-designed administrative remedies free from federal standards and control indicates that Congress opposes such a system for §1983 litigants generally.

be resolved in deciding whether to require exhaustion of administrative remedies in cases brought under §1983 are equally weighty questions concerning the design and scope of an exhaustion requirement. Here too, the answers are not inferable, as they are in other contexts, from "a particular administrative system Congress has constructed." McGee v. United States, 402 U.S. at 483 n.6. Resolution of these questions requires hard policy choices; but instead of seeking congressional direction, the Fifth Circuit has set out to decide the policy questions itself, on a case-by-case basis. Moreover, only Congress has the ability to draw lines that will preclude the costly, burdensome, remedy-delaying and court-burdening litigation that incremental judicial development of exhaustion in the context of thousands of different agencies would necessarily spawn.

a. Categorization

In what categories of claims should exhaustion be required? Legislative categorization could afford reasonably bright lines that courts are generally incapable of drawing. Compare Wilwording v. Swensen, 404 U.S. at 251 ("state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs") with 42 U.S.C. §1997e (exhaustion only for condition of confinement claims of adult convicted prisoners).

b. Multiple Jurisdictions

Enormous uncertainty and endless litigation would ensue from exhaustion without the usual centralizing and unifying interaction of a single system of courts on a single administrative agency. Claims under §1983 arise in literally thousands of state, county, and municipal jurisdictions, and in dozens of agencies in each jurisdiction.

Only Congress, through legislation such as 42 U.S.C. §1997e, could provide the necessary unifying standards which the legislative history of the Act indicates that Congress would probably insist on, assuming arguendo that Congress might eventually decide to require exhaustion in non-prison context.

c. Tolling and Duration

Because statutes of limitations governing §1983 actions are not tolled pending exhaustion, Board of Regents v. Tomanio, supra, an exhaustion requirement could lead inexorably to the effective repeal of §1983. This is plainly a matter for Congress, not this Court. Congressional activity in analogous areas suggests that Congress would avoid that result by imposing time limitations and tolling rules different than those the Fifth Circuit has pointed toward, if it required exhaustion at all. See, e.g., 42 U.S. §1997e

(continuance for ninety day maximum); 42 U.S.C. §2000e-5 (right to sue after 180 days); 20 U.S.C. §2738, discussed supra, at n.41 (immediate right to sue).

d. Collateral estoppel, and res judicata

Although the court below stated that decisions of state or local administrative agencies would not be afforded collateral estoppel effect (634 F.2d at 910, PA 41a),[60/] the recent holding that collateral estoppel applies with full force in the context of §1983[61/] and its applicability to certain federal administrative factual determinations[62/] guarantee further litigation con-

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60/ See, to that same effect, Moore v. City of East Cleveland, supra, 431 U.S. at 524 n.2 (Burger, C.J., dissenting).

61/ Allen v. McCurry, supra.

62/ See, e.g., United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966).

cerning the issue, especially if considerations of comity moved the Court to require state judicial review of state administrative action. See City of Columbus v. Leonard, supra (Rehnquist, J., dissenting). Such a requirement might well trigger both collateral estoppel and res judicata,[63/] and thereby transform §1983 into an empty shell. Congressional consideration of such consequences is plainly required, in light of the clear congressional intention that §1983 guarantee prompt access to the federal forum for §1983 cases generally. See Points I and II, supra.

e. Waiver

What consequences would attach to failure to comply with time limits and

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63/ See American Mannex v. Rozands, 462 F.2d 688 (5th Cir.), cert. denied 409 U.S. 1040 (1972); Sinocropi v. Nassau County, 601 F.2d 60 (2nd Cir. 1979); Mitchell v. National Broadcasting Co., 553 F.2d 265 (2nd Cir. 1977).

other state or local procedural prerequisites were exhaustion to be required? Presumably, negligent or even deliberate waiver would not lead to the harsh consequences of foreclosing the federal §1983 action, since Congress has neither expressly imposed exhaustion as a jurisdictional prerequisite nor designed its own administrative system from which that result could fairly be inferred.[64/] Moreover, unlike state prisoners, who under the 1980 Act will be specifically apprised of available remedies so as to make negligent "waiver" unlikely,[65/] most §1983 plaintiffs

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64/ See Weinberger v. Salfi, supra (exhaustion a jurisdictional prerequisite waivable only by the government); McGee v. United States, supra (inference that Congress barred consideration of claims not presented to agency). See generally K.Davis, Administrative Law Treaties, §20.06 (1958 ed.) and Supps. 1970, 1976, 1980).

65/ See Department of Justice, "Standards for Inmate Grievance Procedures", 46 Fed. Reg. 48187, §40.3, "Communication of Procedures" (Oct. 1, 1981).

will not ordinarily be aware of available remedies. But waiver has been found in analogous situations for reasons of federalism and comity. See Huffman v. Pursue, Ltd., 420 U.S. 592, 611 n.22 (1975). Here too the competing policies are appropriately resolved by Congress to preclude the destruction of §1983 claims Congress has not intended to destroy.

f. Interim Injunctive Relief

The availability of interim injunctive relief has been an important part of §1983 jurisprudence. If exhaustion were required, and an administrative agency was not empowered, or declined, to grant interim relief, would the federal court grant appropriate interim relief and continue a case pending exhaustion? Could it simply assume jurisdiction and proceed to judgment? Would the interim relief factor make exhaustion generally inappropriate in First Amendment cases even if exhaustion could otherwise

be required? These and similar questions could be answered swiftly and surely in legislation, but a case-by-case approach will lead to uncertainty and delays in precisely those cases where certainty and speed are needed.

* * * * * * *

The Fifth Circuit has imposed and embarked on the design of an exhaustion scheme of its own making solely by "considering the policy factors" which it believes favor exhaustion, without reference to congressional policy. PA 49a. Its decision to do so was error: the contentions pressed on it are properly "addressed to the political branches of the Government ... and not to the courts." Diamond v. Chakrabarty, 447 U.S. at 317.

IV. THE ADMINISTRATIVE PROCEDURES AVAILABLE TO PETITIONER ARE PLAINLY INADEQUATE AND DEMONSTRATE WHY EXHAUSTION HAS NOT BEEN REQUIRED UNDER SECTION 1983

The administrative procedures available to petitioner cannot possibly be deemed adequate by any of the standards this Court has articulated in other exhaustion cases. They provide a classic illustration of the reasons why exhaustion of state administrative process has never been required under §1983, and why Congress has refused in civil rights cases generally to deal with exhaustion in any way other than not requiring it, or controlling it under demanding federal standards.

A. The Available Administrative Remedies

Examination of the administrative procedures available to petitioner at the University level and through the Florida Human Relations Commission demonstrates what Judge Hatchett described as petitioner's "plight"

in pursuing her administrative claim. PA 112a.

The University's grievance procedure, codified in Chapter 6C8-4.05 of the Florida Administrative Code, begins with an informal discussion between the employee and her immediate supervisor. If the problem is not resolved at that level within five days, the employee must submit a formal, written grievance. The grievance is then reviewed again by the employee's immediate supervisor and forwarded to progressively higher levels of the University administration until it reaches the University Vice-President, who has ten days to issue a written determination. Fla. Adm.Code Ch. 6C8-4.05.

If dissatisfied with this determination, the employee may ask the University's Director of Personnel for review by a grievance committee, which must thereupon be appointed within thirty days of the date of the grievance. Ch.6C8-4.05(2)(e)(f). There is no provision for an evidentiary hearing, no

role for counsel and no right of compulsory process to obtain relevant documents or the testimony of favorable witnesses.

The committee has thirty days to complete this review process and to submit a recommendation to the University President, who in turn reviews the committee's recommendations and has fifteen days to provide the employee with a written decision.[66/] The President's decision is the final step in the University's grievance mechanism. Ch.6C8-4.05(2) and (3). No statutory provision we have found would permit him to award damages.

Once the University President has

66/ If the University is not complying with its own procedures at any stage, the employee may complain to the Florida Director of Personnel in the Department of Administration. That office is limited to requesting official compliance, and has no power to insist on it. Fla.Adm. Code Ch. 22A-15.05(3).

rendered a decision, the employee may either file her complaint, or renew her complaint, with the Human Relations Commission.[67/] The complaint must be filed within 180 days of the event which gave rise to the grievance and the Commission has fifteen days to notify the respondent that a complaint has been filed. The complaint is then set adrift in an administrative process which lacks any deadlines. Fla. Adm. Code Ch. 9D-9.01-.03.

An indefinite period of investigation follows the filing of a complaint with the Commission. The Executive Director of the Commission may begin the investigation through the Office of Field Services, may suspend the investigation for possible resolution at the University level, or may refer

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67/ As a technical matter, petitioner can file her claim initially with the Human Relations Commission but it will generally be referred to the University. Fla.Stat.Ann. §23.167(11); Fla. Adm. Code Ch. 9D-9.03(8).

the investigation to another state or local agency for up to one year. If a referral is made and the referral agency does not resolve the complaint, the Commission may proceed to the next procedural stage or direct the Office of Field Services to conduct further investigation. Ch. 9D-9.02-.05.

Once the Executive Director has determined that an investigation is complete, the investigation results go to the Office of the General Counsel, who determines whether "reasonable cause" exists to believe that an unlawful practice has occurred. If it does, a Notice of Determination is served on the parties, consisting primarily of an invitation to both parties to participate in the next procedural stage, "conciliation" where the Office of Field Services tries to effect a resolution of the unlawful practice. The conciliation process may last up to 30 days and must be completed before the complainant can seek a remedial order.

Ch.9D-9.04-.08.

If the General Counsel makes a finding of no reasonable cause, the complainant may file a "Petition for Redetermination" within 20 days, to be heard before a panel of Commissioners. If the panel finds that "reasonable cause" exists, the complainant is allowed to proceed to the conciliation stage. The panel may also direct that the complaint be returned to the Office of Field Services for even more investigation, or dismiss the complaint. Ch. 9D-9.07-.08.

A complainant may file a Petition for Relief after she has received a finding of reasonable cause and "A Notice of Failure of Conciliation". This entitles her to a full evidentiary hearing, but there is no deadline within which the hearing must be scheduled. Ch.9D-9.08.

The hearing is conducted under the procedures contained in Chapter 9D-8 of the Administrative Code, and results in a recom-

mendation either to dismiss the complaint or to provide relief. The Commission must act upon the recommendations of the hearing officer, but again there is no deadline. Upon a determination that unlawful practices have occurred, the Commission may "order" affirmative relief, but its orders have no binding effect unless the Commission seeks enforcement in a state court, which it is under no obligation to do.[68/] Moreover, if an enforcement petition is filed in state court, the employer-respondent is entitled to trial de novo. Fla.Stat.Ann. §120.69(5). The Commission has no authority to award damages

B. The Available Remedies Are Inadequate

This administrative scheme combines the worst features of several administrative

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68/ Fla.Stat.Ann. §120.69(1)(a). Alterantively, if the HRC finds for petitioner but declines to seek enforcement, petitioner could seek enforcement in the circuit court after waiting 60 more days. Fla. Stat.Ann. §120.69(1)(b). The claim would then be relitigated de novo. §120.69(5).

models which this Court and other federal courts have previously condemned.

1. Effectiveness

In McNeese v. Board of Education, where the Superintendent of Education could enforce his ruling that plaintiff's rights had been violated only by filing a petition in the state courts, this Court held:

> It would be anomalous to conclude that such a remedy forecloses suit in the federal courts when the most it could produce is a state court action that would have no such effect.

373 U.S. at 675. The present scheme is indistinguishable from McNeese in this regard, and finding the procedures available at the Commission to be an effective remedy would require overruling McNeese.[69/]

69/ The necessity of appealing to the state courts to enforce even a favorable administrative ruling is inconsistent with the holding in Monroe v. Pape, that §1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." The Commission has even less authority than the "inadequate"
(footnote continued on following page)

Apart from their ineffectiveness under McNeese, the Florida procedures are deficient in other respects as well.

First, nowhere in the administrative process -- neither at the University level nor at the HRC -- can petitioner receive the compensatory damages she seeks.[70/]

(footnote continued from preceding page) administrative body in McNeese, which at least had theoretical power to cut off funds to the erring school district, 373 U.S. at 675-76, and was required to seek enforcement of any violations it found. By contrast, the Commission's power is of an advisory nature which this court has found insufficient even in other contexts to require exhaustion. Frozen Food Express v. United States, 351 U.S. 40 (1956); United States Alkali Export Assn. v. United States, 325 U.S. 196 (1945).

Interestingly, Florida's Title VII deferral procedures have on similar grounds been found so ineffective as to excuse compliance with the exhaustion provisions of 42 U.S.C. §2000e-5(c). See Jones v. Askew, No. 78-111-Civ.-J-WC (M.D. Fla. Dec. 3, 1980).

70/ See Statement of the Case, supra at n.3. Even the Second Circuit, which prior to this case had been the Circuit most hospitable to administrative exhaustion, has recognized that the unavailability of damages is sufficient to render an administrative remedy inadequate. Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974). See also Gonzalez v. Shanker, 533 F.2d 832, 838 (2d Cir. 1976).

Second, the available procedures are structurally deficient. The critical questions in this case, as in most discrimination cases, are factual. Yet there is no provision for an evidentiary hearing at the first critical stage of the administrative process - the University level. The consequences of this omission were summarized by the Second Circuit in Plano v. Baker, 504 F.2d 595, 598 (2d Cir. 1974):

> Where a dispute is largely factual, we fail to see how an administrative remedy that expressly forbids the examination of witnesses can be considered adequate for purposes of the exhaustion rule.

Although a hearing is later available at the HRC stage, a complainant has already been forced to expend her time, energy and resources at the University level by the time it is reached.

2. Clarity

As the discussion above indicates, the remedies available to petitioner are

exceptionally convoluted. When petitioner filed her complaint, there were at least two, and possibly three, administrative agencies competing for jurisdiction of her discrimination claim. As already noted, petitioner could have filed a grievance with the University itself or with the Human Relations Commission. Also, the State Division of Personnel provided an avenue of appellate review for discrimination complaints until its governing regulations were changed shortly after this case began.[71/] But regardless of which route she chose, petitioner could only complete her administrative remedy at the Human Relations Commission where even a favorable ruling would not have been enforceable without a state court order.

71/ The Division of Personnel still promulgates general anti-discrimination guidelines. But its current regulations specify that any claimed violation of those guidelines must be processed through the agency involved (in this case, the University) or the Human Relations Commission. Fla.Adm.Code Ch. 22A-15.05(1).

This "system", as a result, suffers precisely the defect identified by this court in Wilwording v. Swenson, 404 U.S. 249, 250 (1971), quoting from Marino v. Ragen, 332 U.S. 561, 568 (1947):

> The exhaustion-of-state remedies rule should not be stretched to the absurdity of requiring the exhaustion of ... separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find that none of the [alternatives] is appropriate or effective.

3. Speed

Not surprisingly, the complicated nature of these procedures leads to inevitable delays. Even if every stage of the University's appeal mechanism is completed on schedule, it could still take petitioner up to seventy-five days to obtain a final ruling from the University President. Assuming that ruling were negative, petitioner would then have to begin again with the HRC which is under no deadline to issue its

final order. In a case filed almost contemporaneously with petitioner's federal complaint, the HRC took more than a year and a half to issue its final, advisory decision, Hargis v. Leon County School Board, II Florida Administrative Law Reports 957-A(1980), after which state court enforcement would still be required. See PA 114a.[72/] Exhaustion is not required where the administrative process entails excessive and undue delay. See, e.g., Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926)(two year delay); White v. Matthews, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978)(200 days).

Where Congress has acted in related areas, it has permitted access to federal court far more promptly than the Florida

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72/ If the HRC has not acted in 180 days, a complainant may directly bring a civil suit in state court under the Florida Human Rights Law. Fla. Stat.Ann. §23.167(12).

procedures would permit. See supra at 68-69. While these deadline are not controlling, they provide an ample basis for concluding that the administrative procedures here are inadequate.

4. Futility

Requiring petitioner to exhaust would be requiring her to engage in an obviously futile gesture. Counsel for petitioner met with the acting president of the University and the University's attorney to discuss petitioner's grievance, and petitioner began this §1983 action four months later only after that meeting failed to produce a satisfactory response.[73/] Although the Board have dismissed that meeting as inconsequential and argued that its informal nature cannot compare with the formal grievance mechanism established by the University, the first

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[73/] See Statement of the Case, supra, at 5 n.4.

stage of the grievance mechanism (and the only stage at which binding relief could be had without court order) would have culminated with the University President who had already rejected petitioner's claim. The federal courts have never "'required [litigants] to go through obviously useless motions in order to preserve their rights.'" Bendure v. United States, 554 F.2d 427, 431 (Ct.Cl. 1977)(citation omitted), cert. denied sub nom. Alexander v. United States, 365 U.S. 880 (1961); McNeese v. Board of Education, 373 U.S. at 676; Hillsborough Township v. Cromwell, 326 U.S. 620, 625 (1946); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 35 (1934).

5. Burden of establishing adequacy

The Fifth Circuit did not disagree with the conclusion that the Florida procedures fail to provide a plain, speedy, and effective administrative remedy, but held instead that it could not decide upon the record presented "whether state administra-

tive remedies were adequate in the context of the rights asserted by [petitioner]." PA 55a. By remanding to the district court for an evidentiary hearing, the Fifth Circuit implicitly placed the burden on petitioner to establish the inadequacy of the administrative remedy.

That allocation of the burden of persuasion is inconsistent with McNeese, where this Court declined to remand for further proceedings despite its observation that "it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights." 373 U.S. at 674-75. Instead, the ambiguity of the record was seen in McNeese as a failure of defendant's burden and thus additional justification for the ruling that administrative exhaustion was not required. If this Court had intended to place the burden of proof of adequacy

on petitioner, it could not have reached the decision it did in McNeese.[80/]

For the foregoing reasons, petitioner could not be required to exhaust the remedies available to her even if some §1983 litigants or claims were generally subject to an exhaustion requirement. A case where exhaustion could not in any event be required is plainly an inappropriate occasion for overturning a longstanding rule generally forbidding required exhaustion. The judgment below must be reversed.

80/ Accord, Morgan v. LaVallee, 526 F.2d 221, 224 (2d Cir. 1975)("Before the court below may relinquish its §1983 jurisdiction it must, on the most narrow reading of the cases, be positively assured -- it may not presume -- that there are speedy, sufficient and readily available administrative remedies remaining open to pursue, an assurance certainly not attainable on this record"); Swan v. Stoneman, 635 F.2d 97, 103 (2d Cir. 1980).

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the judgment below be reversed.

Respectfully submitted,

CHARLES S. SIMS
Counsel of Record
BRUCE J. ENNIS, Jr.
E. RICHARD LARSON
AVIAM SOIFER
STEVEN R. SHAPIRO
JOEL M. GORA

Attorneys for Petitioner

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No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

MITCHELL D. FRANKS
DEPT. OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
Suite 1501
The Capitol
Tallahassee, FL 32301
(904) 488-1573

JEFFREY H. KLINK
Counsel of Record
MAHONEY HADLOW & ADAMS
800 Barnett Bank Building
100 Laura Street
P.O. Box 4099
Jacksonville, FL 32201
(904) 354-1100

Counsel for Respondent

QUESTIONS PRESENTED

Whether under well-established flexible rules of judicial administration courts may defer the exercise of jurisdiction pending a § 1983 claimant's resort to "plain, adequate and available" state administrative remedies?

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STATEMENT OF THE CASE

I. COMPLAINT

Between June, 1972, and February, 1979, plaintiff-petitioner, a qualified white female, unsuccessfully applied for at least thirteen other positions at Florida International University ("FIU"). (JA 31-33)[1] Instead of plaintiff, "many Latins and other non-whites" were selected. (JA 32) Generally alleging that applicant "minority preference" policies and promotion practices at FIU discriminated against her on the basis of "race and/or sex", plaintiff sued the Board under § 1983. (JA 30,31,34,36)

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1 References are to the Amended Complaint (JA 29-57) filed against the Board of Regents of the State of Florida ("Board"). It is identical to the original Complaint filed against FIU which the district court dismissed based on FIU's lack of legal capacity to be sued. (JA 1-11, 25-27).

Primarily seeking declaratory and equitable relief (promotion to the "next available position" or one-half million dollars in actual and exemplary damages), plaintiff contended that an actual "due process" controversy existed with FIU, that she was "in doubt as to her status and rights under the Constitution," and that she would suffer "irreparable injury" because she lacked any "plain, adequate, or speedy remedy at law." (JA 22, 36-39)

II. DISMISSAL

The Board moved to dismiss because, inter alia,[2] plaintiff had yet to pursue adequate and available state administrative remedies (hereinafter "Exhaustion").

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2 The other Rule 12(b), Fed. R. Civ. P., motions raised issues concerning the Board's "non-person" status under § 1983 and whether plaintiff's allegations of respondeat superior and FIU's commitment to "affirmative action" stated claims upon which relief could be granted. Alternatively, the Board moved for a more definite statement. (JA 58-59, 62-80)

(JA 58, 65-71) In response, plaintiff did not contest these facts but argued that exhaustion was unnecessary. (JA 86-87) Without addressing the Board's other motions, the district court dismissed for failure to exhaust. (JA 92)

III. APPEAL

The Fifth Circuit panel, (Godbold, J.) reversed per curiam. On rehearing en banc, the original panel joined fourteen other members of the court in Judge Roney's majority opinion vacating the panel's "iron-clad" no-exhaustion rule. In concluding that exhaustion "should sometimes precede federal court consideration of § 1983 claims," the majority initially analyzed the holdings of this Court's § 1983 cases, and found no contrary "iron-clad" rule. (PA 4a, 13a-31a) In addition, the court gave detailed consideration to this Court's exhaustion

doctrines (PA 5a-12a); the positions among the circuits (PA 31a-36a); and the purposes and intent of Congress in enacting § 1983 - finding exhaustion "wholly consistent" with the applicable Congressional purposes outlined by this Court in Monroe v. Pape, 365 U.S. 167, 173-74 (1961). (PA 31a-40a) Noting the absence of any res judicata or collateral estoppel effects from exhaustion, the court emphasized that the "proper focus" should be on relief from the wrong. (PA 40a-41a)

In adopting a flexible rule, the majority found that exhaustion would promote five primary, controlling factors: (1) judicial efficiency; (2) "institutional ripeness"; (3) improvement of state procedures; (4) simpler, speedier, and less expensive remedies for the parties; and (5) federalism and comity:

focusing on "the end [-not the beginning-] of state action" to confirm the necessity for any federal protection; respecting the state procedures and rules which federal courts have helped to develop; and even treatment of state and federal defendants. (PA 41a-49a) Finally, under the majority's opinion, no § 1983 claimant must resort to administrative channels before filing suit unless those remedies satisfy certain "minimum conditions"[3] and the need for exhaustion in light of the particular claims asserted justifies their pursuit. (PA 50a-51a)

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3 "First, an orderly system of review or appeal must be provided by statute or written agency rule. Second, the agency must be able to grant relief more or less commensurate with the claim. Third, relief must be available within a reasonable period of time. Fourth, the procedures must be fair, and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims. Fifth, interim relief must be available, in appropriate cases, to prevent irreparable injury and to preserve the litigant's rights under § 1983 until the administrative process has been concluded." (PA 50a)

Finding the record inadequate to make these considerations in the case sub judice, the majority remanded with instructions to permit plaintiff to amend her complaint, and then to determine whether prior resort to administrative channels should be required. (PA 52a-55a)

SUMMARY OF ARGUMENT

A flexible exhaustion rule in § 1983 jurisprudence can accommodate, perhaps uniquely, two basic duties of the federal courts: protection of constitutional rights when necessary and preservation of "Our Federalism". Similar procedural "deferral" rules of judicial administration have historically served to allocate limited judicial resources among persons and issues most in need. As such, a flexible exhaustion rule neither displaces a federal § 1983 remedy nor bars the courthouse doors. Rather, it serves to

control the exercise of increasingly taxed federal judicial authority until appropriate: immediately if necessary, or as the unifying final word. At the same time the rule promotes "most persuasive" Constitutional, Congressional, and judicial policies.

Contrary to the historically ironic and misplaced, if not inaccurate assertions of petitioner and her amici, neither Congressional intent nor stare decisis would preclude a decision by the Court to accept this compellingly persuasive accommodation.

An "iron-clad" no-exhaustion rule for § 1983 cases would unnecessarily stand apart from the Court's well-established flexible exhaustion doctrines. Despite the Court's use of seemingly categorical language in prior § 1983 cases, as scholarly commentators and other lower courts have long espoused, analysis can clarify

their holdings and, without reversal, place them in the mainstream of exhaustion law. However, even if clarification would not alone accomplish that task, stare decisis, a flexible doctrine which accommodates change as institutions develop, should not impede this increasingly warranted change.

A flexible exhaustion rule would promote the important remedial objectives of the 42nd Congress which the concluding plain language of § 1983 - "or other proper proceeding for redress" - would hardly preclude. Of course, any intent imputed to the Congress in 1871 concerning prior resort to "plain, adequate, and available" state administrative remedies stands as an historical anachronism. As a result, the central relief aims of § 1983 in tandem with the other persuasive Constitutional and judicial policies served by the rule should prove

determinative. Plaintiff's remaining Congressional and policy "barriers," aside from inaccuracies, quickly fade upon proper construction of a flexible exhaustion rule.

Unless the Court imposes an iron-clad no-exhaustion rule or adopts one substantially different from that below, the prior remand to the district court for its initial application should remain unaltered. Petitioner raises her first objections to the availability or adequacy of administrative remedies in this Court. Thus, the record lacks some of the relevant facts necessary to resolve them. Of course, the nature of those administrative remedies stand as matters of state public record. Should the Court elect to pass judgment on their adequacy, assuming their availability, that record, under proper construction of the lower court's rule, contradicts petitioner's misplaced adequacy arguments.

ARGUMENT

I. A FLEXIBLE EXHAUSTION RULE WOULD ACCOMMODATE AND PROMOTE IMPORTANT CONSTITUTIONAL, CONGRESSIONAL AND JUDICIAL POLICIES:

Flexible rules of judicial administration which serve to defer the exercise of federal jurisdiction find deep roots in the Court's jurisprudence. E.g., Ex Parte Royall, 117 U.S. 241 (1884). With the advent in this century of administrative remedies and recognition that their use prior to seeking relief in court could serve compelling Constitutional and judicial policies, flexible exhaustion rules developed. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Porter v. Investors Syndicate, 286 U.S. 461 (1932); Natural Gas Pipeline Company of America v. Slattery, 302 U.S. 300 (1937); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Petroleum Exploration, Inc. v. Public Service Commission of Kentucky, 304 U.S. 209

(1938); Lane v. Wilson, 307 U.S. 268, 274 (1939); McKart v. United States, 395 U.S. 185 (1969); FAIR v. McNary, ____ U.S. ____, 50 U.S.L.W. 4017 (1981); see, generally Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537 (1974). Predicated not on the denial of jurisdiction but on its "most proper and orderly" exercise, administrative exhaustion doctrines became an increasingly important tool of judicial administration. Prentis, 211 U.S. at 232; Myers v. Bethlehem Shipbuilding Corp., supra; McKart v. United States, supra at 193-195; Parisi v. Davidson, 405 U.S. 34 (1972); see Comment, 41 U. Chi. L. Rev., supra at 540-542; K. Davis, Administrative Law Treatise § 20.01 et seq. (1958), Cf. Delaware and Hudson Company v. United

States, 266 U.S. 438; 2 F. Cooper, State Administrative Law 573 (1965) (primary jurisdiction). A flexible rule for § 1983 cases would also promote the compelling policies which that body of precedent has long served while at the same time remain faithful to the central purposes of the 42nd Congress and the role of federal courts in the necessary protection of Constitutional rights.

A. Full Protection of Constitutional Rights

Unlike some of the Court's permanent restrictions on the "broad swath" cut by the literal scope, or availability of § 1983 relief,[4] the rule imposes no

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4 Polk County v. Dodson, ___ U.S. ___, 50 U.S.L.W. 4077 (1981); Parratt v. Taylor, ___ U.S. ___, 49 U.S.L.W. 4509 (1981); Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693 (1976). Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); See generally Developments in the Law Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1172, 1190-1249 (1977).

substantive limitations. At most it defers rather than displaces a federal § 1983 remedy until appropriate or necessary. Cf., FAIR v. McNary, ____ U.S. ____, 50 U.S.L.W. 4017, 4023 n.4-5, 4027 (1981) (Brennan, J., concurring). Most importantly, should "irreparable injury" to the claimant or other appropriate circumstances warrant, a flexible exhaustion rule provides the federal trial courts with familiar discretion to exercise judicial authority immediately. In addition, in every case after resort to administrative procedures the courts may speak the final, unifying word if needed.

Application of a flexible rule would not require claimants to pursue remedies seriatim or endure legally damaging delays. Apart from "minimum conditions," note 3, supra, which expressly preclude this "short parade of horribles," the decision also invokes a substantial body

of exhaustion precedent which could preclude the need for claimants to pursue multiple administrative remedies. Marino v. Ragen, 332 U.S. 561, 568-69 (1947); Wade v. Mayo, 334 U.S. 672, 677-78 (1948); Levers v. Anderson, 326 U.S. 219, 222-23 (1945). Moreover, plaintiff would not risk having her federal claim time-barred by administrative delay: the Court's decision in Board of Regents v. Tomanio, 446 U.S. 478, 490 (1980), already contains the seeds of a federal tolling doctrine.

Further, apart from suggestions of harassment, lack of common sense, or the need for immediate federal intervention, a state agency would undoubtedly face a successful waiver or estoppel argument in attempting to rely upon a limitation period bar while a claimant resorted to requisite administrative procedures. Also, claimants would not risk loss of a federal forum under the rule by "guessing

wrong" on the need to exhaust and filing suit. If no remedy were then "available" (because administrative filing deadlines had run which the agency would not or could not waive), then the failure to waive would constitute final state action and a federal court action would proceed.

Finally, given the realities of federal civil dockets, a flexible rule would generally promote speedier relief for meritorious claims either during the administrative process itself or by having sharpened the facts and issues and developed a record for more expeditious judicial review.

B. Federalism And Comity

Judicial preservation of "Our Federalism" has fortunately enjoyed an enduring, though variable, history - one which the 14th Amendment and § 1983 did not rewrite. E.g., Younger v. Harris, 401

U.S. 37, 44 (1971); Screws v. U.S., 325 U.S. 91, 109 (1945).[5] Of course, neither comity nor federalism can serve to subvert necessary federal protection of Constitutional rights, and the decision below does not suggest otherwise. As one commentator has noted, 29 Stan. L. Rev. supra at 1205, "[t]he task has always been to find an accommodation" - a task for which a flexible rule would prove well-suited. Unlike the abstention doctrine coupled with principles of res judicata and collateral estoppel, a flexible exhaustion rule carries no potential for denying access to a federal court if necessary.

To be sure, federalism and comity have historically found widest recognition

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5 See also, Rizzo v. Goode, 423 U.S. 362, 379-80 (1976); Huffman v. Pursue, 420 U.S. at 599-612. See generally Developments, 90 Harv. L. Rev., supra; Weinberg, The New Judicial Federalism, 29 Stan. L. Rev. 1191 (1977); Durschlag, Federalism and Constitutional Liberties: Varying The Remedy To Save The Right, 54 N.Y.U. L. Rev. 723 (1979).

in the context of pending state proceedings. However, they have enjoyed other applications - relevant to the case at hand - as well. E.g., Huffman v. Pursue, Ltd., supra (no state appeal pending); National League of Cities v. Usery, 426 U.S. 833 (1976) (state employment decisions);[6] Rizzo v. Goode, 423 U.S. at 366-80 (injunctive relief against state officials who are not the culpable parties); Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 247 (1952) (interference with state administrative procedures). Indeed, an iron-clad no-exhaustion rule carries as much, if not greater potential for interference with

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6 This is not to suggest that federalism immunizes public employment discrimination from federal scrutiny. However, where, as here, see PART IV, infra, a state has extensive constitutional, statutory, and administrative prohibitions against such discrimination, and adequate procedures for redress of violations, notions of federalism should argue forcefully for a flexible exhaustion rule.

state "self-policing" procedures and institutions by permitting parties to bypass them completely than does selective interference with pending proceedings where, as here, only the claimants can invoke them in any event. Cf., Great American S. & L. Assn v. Novotny, 442 U.S. 366 (1979).[7] Given the roles played by Congress and the federal courts in developing many state administrative procedures, it would prove an unnecessary and unintended historical irony for courts now to permit, rather woodenly, the atrophy of these same procedures.

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7 Petitioner's repeated refrain that "plaintiffs will always choose the 'fairest' forum should be dismissed on grounds of common sense. Plaintiffs and their attorneys will most likely choose the most advantageous forum. If one forum presented, for example, greater risks and expenses for defendants, plaintiffs may choose it in order to enhance settlement. Under petitioner's "free market" system, to compete the state would need to develop equally disadvantageous forums for its defendant agencies or ones which are clearly pro-claimant. Neither alternative, however, would serve the goal of providing more fair or just forums.

C. Faithfulness To The Purposes Of The 42nd Congress

A flexible exhaustion rule and the Congressional purposes which underlie § 1983 enjoy a striking functional similarity: necessity. The legislative history makes clear that necessity led to the creation of this federal remedy for the protection of constitutional rights. Monroe v. Pape, 365 U.S. 167 (1961). A flexible exhaustion rule promotes the same concerns: exercising federal judicial authority when necessary for the protection of constitutional rights.[8] Indeed, as the court below and other scholars have emphasized, a flexible exhaustion rule promotes the applicable purposes of this 1871 statute. (PA 38a-40a). See

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8 The proponents of the legislation carefully noted that the Civil Rights Act of 1871 was intended to "preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws." Congressional Globe, 42nd Congress, 1st Sess. (hereinafter "Globe") 808 (1871).

generally Comment, 41 Univ. Chicago L. Rev., supra, at 553 (1974); Developments, 90 Harv. L. Rev. supra at 1264-74.

As others have advocated, Id., the "supplemental remedy" language of Monroe v. Pape finds no functional support in the Congressional purposes underlying § 1983 - at least as applied in the context of exhaustion of administrative remedies. See also, City of Columbus v. Leonard, 443 U.S. 905, 906 (1978) (Rehnquist, J.) (dissent from denial of certiorari). As Justice Douglas concluded over two decades ago, Congress in 1871 was concerned with post-war passions or prejudices, state laws (even where adequate) not being enforced, and with Constitutional rights being denied. Monroe v. Pape, 365 U.S. at 173-180. Since the 42nd Congress was also aware of principles of judicial finality, Allen v. McCurry, 449 U.S. 90 (1981), its post-Civil War fears provide historic

accuracy for the conclusion that in 1871 Congress intended a federal remedy supplemental to any state judicial remedy.[9] However, these forum-denying concerns have no application to administrative remedies that carry no res judicata or collateral estoppel baggage.

As petitioner emphasizes, flexible rules of judicial administration did not develop into a formal exhaustion doctrine until well into the next century. (PB 30-31) Thus, Congress in 1871 could not have intended to require prior resort to state administrative remedies. However, the converse must also be true: Congress could not have considered and intended to forbid application of a

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9 The federal judicial remedy, if supplemental, is not exclusive. Jurisdiction over § 1983 actions is clearly concurrent. Congressional Globe Appendix, 42nd Congress, 1st Sess. (hereinafter "Globe App.") 86 (Storm); Globe App. 69 (Shellabarger).

well-founded rule of judicial administration.

Despite this historical anachronism, the plain language of § 1983, particularly when coupled with the absence of any evidence in the legislative history to suggest that Congress specifically considered and rejected the application of a flexible exhaustion rule,[10] support the

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10 Although the Civil Rights Act of 1871 was the subject of considerable debate and controversy, Collins v. Hardyman, 341 U.S. 651, 657 (1951), comparatively little concern or emphasis was placed on the section that is now codified as § 1983. See, e.g., Globe App., 310 (Maynard) ("I suppose there is not much objection to [§ 1983], for the fact that so far there has been very little said about it. It simply declares in substance that whoever interferes with the rights and immunities granted to the citizens by the Constitution of the United States, though it may be done under state law or state regulation, should not be exempt from responsibility"); Globe App. 313 (Burchard). The discussion by Senator Thurman at Globe 770 indicates nothing to the contrary, despite the efforts of amicus NAACP to consider it so. An accurate reading of Thurman's statements demonstrates that he never proposed an exhaustion or notification requirement, he merely cites as an example of proper federalism an English statute requiring notice (not exhaustion) to local officials before suit can be brought.

conclusion that Congress did not intend to preclude possible administrative faithfulness to the purposes which motivated § 1983.[11] The concluding language of the statute, "or other proper proceeding for redress," justifies the conclusion that means other than federal suits in equity or law may be appropriate avenues for providing relief for violations of constitutional rights.[12] Moreover, the "plain language" fact that Congress specifically granted the federal courts

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11 Indeed, if, as petitioner argues, an imputed intent of the 42nd Congress to deny application of a rule that did not exist should control the exhaustion issue before the Court, then clearly petitioner's employment discrimination claims should not be in court at all. A review of the legislative history of § 1983 by its "deafening silence" convincingly suggests that "it would come as a great surprise [to the 42nd Congress]... to learn that [in the 20th century it was being used to redress public employment discrimination.]" Paul v. Davis, 424 U.S. 693, 699 (1976).

12 There appears to be no articulation by the framers of the intended meaning of this language. It is not inconceivable that Congress intended to leave open a door for development of future avenues of relief.

"equity jurisdiction," under which the courts had historically imposed controls on the exercise of jurisdiction, can hardly be read to support the clear conclusion petitioner seeks to draw.[13]

In sum, the plain language of § 1983 as well as the legislative history support the conclusion that the 42nd Congress was most concerned with relief against constitutional violations at a time when a state judicial forum was thought to be inadequate and a federal forum was viewed as necessary. To argue that these circumstances preclude the application of a flexible exhaustion rule, by which constitutional claimants over a century later can seek adequate relief administratively with no harm to any necessary access to a

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13 E.g., Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297-98 (1943); Pennsylvania v. Williams, 294 U.S. 176, 185 (1934). This flexibility has compelling application to a complaint like petitioner's which primarily seeks to invoke the court's equity jurisdiction.

federal court, inverts Congressional purposes and elevates "forum over substance." The Court's modern cases, which may often have the result of denying a constitutional claimant access to a federal forum, underscore the 42nd Congress' primary concern in passage of § 1983 - the availability of substantive relief, not merely a federal forum. Huffman v. Pursue Ltd., supra; Allen v. McCurry, supra.

D. Assuring The Existence Of Jurisdiction

Unlike Article I Courts over which Congress exercises control without Article III constraints (e.g., the Court of Claims in 1871),[14] jurisdiction of the federal courts only extends to actual cases or controversies. See generally Developments, 90 Harv. L. Rev. at 1292-1300. The Court has recognized this jurisdictional

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14 See Glidden Co. v. Zdanok, 370 U.S. 530, 531 (1962).

limitation under different doctrines including the requirement that exhaustion of nonjudicial remedies may be necessary to assure "ripeness" of a claim for adjudication. Id. (citations omitted); Prentis, supra at 229. This Article III principle has compelling application to the case sub judice.

Plaintiff's alleged controversy exists as a result of hiring decisions made by unnamed personnel at FIU. Prior to being named as a party defendant in this lawsuit, the Board had no involvement with petitioner. That FIU lacks the capacity to be sued under state law, does not create a "controversy" with the Board. Petitioner readily could have sued the President of FIU in his official capacity or those persons who actually made the challenged hiring decisions. At a minimum, exhaustion should be required in this case before plaintiff can subject

this defendant to federal court jurisdiction for alleged constitutional wrongs for which it lacks any factual responsibility. Even if the Court fully accepts plaintiff's allegations that the Board's status as a defendant is merely on behalf of FIU, this conclusion should remain unchanged.

It is also axiomatic that federal jurisdiction to grant relief extends only to properly stated claims. Baker v. McCollan, 443 U.S. 137 (1979); cf. Bell v. Hood, 327 U.S. 678 (1946). Yet, the allegations against the Board rest at most on principles of respondeat superior, Parratt v. Taylor, supra at 4511 n.3; and, even if the Board is viewed only as a representative of FIU, plaintiff's conclusory allegations of "policies" and "patterns" of reverse discrimination fail to provide a proper predicate for the existence of a "controversy" with FIU or

the Board.[15] Rizzo v. Goode, supra at 371-72. Given these conclusory allegations, application of a flexible exhaustion rule, with no harm to claimant, should precede this institutional defendant having to answer them as they presently fail to support the existence of a policy controversy.

The present status of the alleged "state action"[16] in this case (which

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15 Plaintiff has only specifically alleged in support of her university-wide conclusory allegations that she alone on various occasions in the past has unsuccessfully applied for jobs for which "many [not exclusively] Latins and non-whites were selected," and that in the past some black applicants were sought. This Court is obviously not the forum to try the merits of plaintiff's allegations. However, their conclusory nature concerning a "policy" controversy with FIU is further highlighted by a contemporary suit against FIU for alleged university-wide discrimination against blacks. See Lucky v. Board of Regents, 26 Empl. Prac. Dec. (CCH) ¶ 32,071 (S.D. Fla. 1981) (Order on Plaintiff's Motion for Class Certification).

16 While many of the Court's decisions support a contrary conclusion, e.g., Parratt v. Taylor, supra, 49 U.S.L.W. at 4511, it could be argued that the alleged wrongs in this case were not "[m]isuse[s] of power . . . made possible only because the wrongdoer[s were] clothed with the

(Cont. page 29)

status neither a "proper defendant" nor a "proper claim" alone would change) further supports the application of a flexible exhaustion rule to assure the necessity for exercising federal jurisdiction. Parratt v. Taylor, supra. Of course, application of the literal due process analysis in Parratt does not apply to an equal protection claim. Yet, the literal remedial language of § 1983 ("Every person who, under color of [law] ...") combined with the 14th Amendment's literal prohibition ("[n]or shall any State ... deny to any person ... equal protection of the laws") provide support for the lower court's conclusion that any necessary federal intrusion should come after the state, through its administrative

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authority of state law," Id. at 4515 n.10 (Powell, J. concurring), but misuses of an employer's prerogative that exist independent of the employer's private or governmental status. Cf. Polk County v. Dodson, supra at 4079.

procedures and institutions, has had an opportunity to act. Id. at 4513 (quoting Judge Stevens) (citation omitted). Unless "government-halting" hearings to prevent possible discrimination must precede every employment decision, the states cannot reasonably do more than prohibit, and provide adequate redress for discrimination.[17]

E. Promotion Of Contemporary Congressional Policies

In this century Congress has, to a substantial degree, institutionalized the

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17 Given these realities, exhaustion need not be limited to cases where remedies can only be invoked between the time of the wrongful decision and its implementation. In most cases, the unconstitutional decision or action and its initial effects occur too close in time to permit any gap for remedial purposes. Where such a gap does exist it enjoys little, if any, vitality in current limitation-period jurisprudence. E.g., Chardon v. Fernandez, ___ U.S. ___, 50 U.S.L.W. 33-41 (1981). Similarly, for exhaustion purposes, a functional distinction need not be drawn between preventing harm before it occurs and remedying it after it occurs - at least in situations where state or local agencies cannot reasonably prevent its occurrence.

"partnership role" played by state institutions, procedures, and laws in the protection of civil rights - particularly employment discrimination. See, e.g., Title II (Public Accomodation) and Title VII (Employment) of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000a, 2000e. See also 42 U.S.C. § 1988; Carlson v. Green, 446 U.S. 14, 49 (1980) (Rehnquist, J. dissenting). Given this deference to state procedures or state law mandated by Congress, one can hardly conclude that the contemporary congressional policies are to deny, in iron-clad fashion, the states and their agencies an initial opportunity to protect their own citizens against Constitutional wrongs, particularly where that opportunity will not deny necessary immediate or ultimate access to federal courts. Of course, the Court has emphasized the independence of § 1981 and Title VII remedies for employ-

ment discrimination. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). However, the broad institutional point remains the same: Congress has demonstrated a substantial degree of trust in state agencies, laws, and procedures -- particularly in the area of employment discrimination. Intentional employment discrimination factually remains the same wrong whether a remedy is sought under Title VII, § 1981, or § 1983. Logic and common sense suggest that congressionally-mandated resort to state procedures under one label does not change to contemporary congressional distrust of those same institutions when the remedy label changes. Cf. Id. at 456 n.3.

F. Judicial Policies

Apart from Article III concerns, a substantial body of the Court's precedent amply supports the conclusion that a flexible exhaustion rule promotes other

important judicial policies. See, e.g., FAIR v. McNary, 50 U.S.L.W. at 4023 n.5 (citations omitted). For example, the administrative process may produce a resolution wholly satisfactory to the claimant and thus avoid the necessity for judicial intervention. Moreover, where, as in the case sub judice, the allegations are broad and conclusory, the administrative process should sharpen issues, highlight material facts, and generally facilitate (at much less expense to both parties) subsequent judicial action, when and if such action becomes necessary. As a result, both parties and the courts will benefit.

G. Elimination Of Unfairness And Potential Due Process Concerns

The Court below specifically considered the "unfairness" of a flexible exhaustion rule applicable to federal but not state wrongs. (PA 48a-49a) This inequity may have constitutional dimen-

sions. If FIU or the Board is a § 1983 "person" and entitled to Fifth Amendment protection, then the potential consequences to this employer (from government-impairing punitive and compensatory damages under § 1983) for employment discrimination while federal employers enjoy immunity from such consequences may raise due process questions. See Brown v. GSA, 425 U.S. 820 (1976).

II. STARE DECISIS DOES NOT PRECLUDE THE COURT FROM ADOPTING A FLEXIBLE EXHAUSTION RULE.

A. Beginning With McNeese, The Court's Administrative Exhaustion Cases, Upon Clarification, Fit Within The Mainstream Of Traditional Exceptions To The Court's Well-Established Exhaustion Doctrine

The Court below, other circuits before it, and many commentators have carefully analyzed the Court's holdings in earlier § 1983 exhaustion cases and concluded that they do not necessarily

establish an iron-clad rule. See generally, PA 33a-36a; O'Conner, Trends In A Relationship Between Federal And State Courts From The Perspective Of A State Court Judge, 22 Wm. & Mary L.Rev. 801, 809 n.44 (1981); 41 U. Chi. L.Rev., supra; Developments, 90 Harv. L.Rev., supra, 1264-1273; 54 N.Y.U. L.Rev., supra, 739 n.78; Comment, Exhaustion of State Administrative Remedies Under The Civil Rights Act, 8 Ind. L.Rev. 565 (1975); Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts On Section 1983, Comity, And The Federal Case Load, 1973 Law & Soc. Order 559, 563-67 (1973); Note, Limiting The Section 1983 Action In The Wake Of Monroe v. Pape, 82 Harv. L.Rev. 1486 (1969); Comment, Exhaustion Of State Administrative Remedies Under The Civil Rights Act, 68 Colum. L.Rev. 1201 (1968) (citations omitted).

The Board's voice could add little to the persuasive force of the commentators, the lower court below, or other courts by merely reciting their observations. However, to those voices the Board would add that the Court's language in McNeese emphasizes the critical import of a flexible exhaustion rule: "[r]elief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." 373 U.S. 668, 671 (1963) (emphasis added). Under no circumstances would necessary federal § 1983 relief be "defeated" by application of a flexible exhaustion rule. Cf. Board of Regents v. Roth, 408 U.S. 564, 586 n.2 (Douglas, J., dissenting).

Contrary to petitioner's suggestion, it is far from clear that the Court has fully considered and rejected a flexible

exhaustion rule.[18] It does seem clear, however, that the Court has never specifically addressed, let alone rejected, several of the reasons advanced by the court below in adopting a flexible rule, e.g., disparate treatment of state and federal defendants, federalism and comity, and Article III "ripeness". Indeed, prior to its modern § 1983 cases, the Court had long held that 14th Amendment claims were subject to an exhaustion requirement to avoid premature and poten-

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18 The mere fact that there exists a broad general expression on which a decision could have been alternatively grounded is insufficient to invoke the doctrine of stare decisis. In order to attain the force of a holding, a question must be actually before the Court, investigated with care, and considered in its full extent. Humphrey v. United States, 295 U.S. 602, 627 (1935); Cohen v. Virginia, 19 U.S. (6 Wheat) 399 (1821) (Marshall, C.J.). That counsel raises an issue in an appellate brief, does not determine the extent to which the Court actually investigated the issue. Thus, the briefs cited by petitioner - particularly given their content - do not establish the proposition that this Court has "thoroughly" considered the merits of a flexible exhaustion rule. Cf. PB 18 n.12. See also Comment, 41 U. Chi.L.Rev., supra at 542-43 n. 27.

tially unnecessary judicial intervention and to assure the existence of a concrete "case or controversy." Prentis, supra at 229. In addition, the Court has never been fully presented with any positions by Congress concerning a flexible rule. See Part III.

In sum, since the holding of the case below rests in part on grounds which the Court has never specifically rejected, and since McNeese and its progeny can be clarified and placed within the mainstream of this Court's well-established exhaustion doctrines, stare decisis does not preclude the Court from adopting a flexible exhaustion rule. See Monroe v. Pape, 365 U.S. at 221 (Frankfurter, J., dissenting); Girouard v. United States, 328 U.S. 61 (1945); Smith v. Allwright, 321 U.S. 649 (1943); Hertz v. Woodman, 218 U.S. 205, 212 (1909).

B. Even If Clarification Of The Court's Prior Decisions Alone Would Not Permit Adoption Of A Flexible Exhaustion Rule, Stare Decisis Would Not Preclude This Choice

Contrary to petitioner's assertions, PB 18 n.12, if the Court has in fact adopted an iron-clad no-exhaustion rule, it would prove more accurate to describe that end result as having been reached in an "almost off-the-cuff manner" without plenary consideration and full briefing by the parties. City of Columbus v. Leonard, cert. denied, 442 U.S. 905, (1979) (Rehnquist, J., joined by Burger, C. J., and Blackmun, J., dissenting); Runyon v. McCrary, 427 U.S. 160, 186 (1976) (Powell, J., concurring). Apart from this fact, Monell v. Department of Social Services, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring), the Court need not remain inflexibly bound by seemingly-categorical language in prior

decisions for several cogent reasons. Id. at 696-701.

First, a flexible exhaustion rule would not contradict the intent or purposes of the 42nd Congress. See Part I C. Moreover, aside from the critical inaccuracies, see Part III, infra, the views of subsequent Congresses do not require a contrary conclusion. Consumer Product Safety Commission v. GTC Sylvania, 447 U.S. 102, 118 n.13 (1980); United States v. Clark, 445 U.S. 23, 33 n.9 (1980); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979); TVA v. Hill, 437 U.S. 153, 193 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 353 n.39 (1979); Monroe v. Pape, supra at 221 (Frankfurter, J., dissenting).

Second, given the Court's otherwise well-established exhaustion doctrines in § 1983 and 14th Amendment cases prior to Monroe and McNeese, it can hardly be

argued that the latter were not departures from prior decisions concerning the need to exhaust adequate administrative remedies.

Third, a flexible exhaustion rule would not frustrate alleged reliance on a contrary iron-clad rule by the legions who have sought, and may continue to seek premature, if not unnecessary relief in a federal forum. A flexible rule would in no event bar necessary access to court and its potential adoption by the Court would likely have only prospective application.

Fourth, given that the Congress in 1871 needed to provide claimants with a forum for relief, it defies logic, if not history to suggest that that same Congress would have attempted to preclude flexible application of a judicial rule which provided claimants with relief more promptly through administrative channels

and without injury to federal court access when such access is necessary.

Finally, petitioner's arguments that Congressional reactions to the Court's decisions have "cast in stone" this alleged iron-clad rule, apart from other inaccuracies, see Part III, infra, ironically contradict history. Congressional silence or acquiescence in substantive holdings of the Court, let alone ones that concern rules of judicial administration, fortunately need not woodenly perpetuate prior statutory interpretations. E.g., Monell, supra; Monroe v. Pape, supra, 365 U.S. at 221. Of course, the perceived intent of Congress carries weight in matters of statutory interpretation. Cf. Brown v. GSA, supra. However, under the Constitution's separation of powers, the unquestionable duty of the courts is to interpret the Constitution and laws in a proper 'case or controversy.' Marbury

v. Madison, 1 Cranch (U.S.) 137 (1803); General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Once performed, that duty does not cease solely by virtue of Congressional acquiesence. To argue otherwise would negate the principle of separation of powers and ironically ignore progressive changes in the protection of fundamental rights under the 14th Amendment and § 1983 by the courts despite Congressional acquiesence in earlier decisions. See generally Higginbotham, Pound Conference, The Priority of Human Rights in Court Reform, 70 F.R.D. 79, 134, 140, 147 (citations omitted) (1976).

III. CONGRESS HAS NOT PRECLUDED THE ADOPTION OF A FLEXIBLE RULE IN § 1983 CASES.

A. Congress Has Consistently Respected Procedural Rules Of Judicial Administration By Which Federal Courts Historically Have Deferred The Exercise of Jurisdiction Under Otherwise Unqualified Statutory Grants

Many of the Court's doctrines for deferring the exercise of jurisdiction

have developed under unqualified jurisdictional grants. E.g., Ex Parte Royall, supra; Huffman v. Pursue, Ltd., supra; Younger v. Harris, supra; Lane v. Wilson, supra at 274 (implying need to exhaust administrative remedies in § 1983 cases). Yet, none of these important doctrines has ever been viewed by Congress as improper judicial negations of the existence of jurisdiction. Surely a flexible exhaustion rule with no federal-forum-denying consequences, can hardly be viewed otherwise. Indeed, Congress has specifically vested federal courts with control over the exercise of jurisdiction over particular claims or parties in several respects. See generally Rules: 6(b), 13(b), (f), 15(a), (d), 16(6), 19, 20, 23, 24, 41 Fed. R. Civ. P.

As petitioner demonstrates, the Court has often recognized the absence of federal judicial authority to impose

or create substantive duties or rights that differ from those created by Congress, and, in addition, that Congress knows how to enact a statutory exhaustion requirement. (PB 28-49). However, this demonstration ignores the critical distinctions between substantive statutory exhaustion requirements and flexible rules of judicial administration.

In many contexts, Congress has imposed substantive exhaustion requirements that generally stand as inflexible bars to the existence of federal court jurisdiction. E.g., Title VII. These requirements constitute substantive limitations on rights as well as federal jurisdiction. United Air Lines v. Evans, 431 U.S. 553 (1977). In contrast, flexible rules of judicial administration, like the rule adopted below, are strictly procedural, impose no substantive limitations on rights, the existence of federal

jurisdiction, or access to a federal court when and if necessary. Rather, procedural rules of judicial administration have historically served to promote a host of considerations, some of which the Constitution mandates: Article III "ripeness" and "case or controversy" concerns, federalism, and full faith and credit. While such rules have come to enjoy codification at times, e.g., 28 U.S.C. § 2254, Congress has never rejected them - perhaps in recognition of the Constitutional policies they promote, or perhaps out of institutional respect for the separate nature of judicial power once it is granted.

Fundamentally misplaced, petitioner's Congressional arguments do not alter the dispositive nature of these critical distinctions: Congress has not precluded adoption of a flexible exhaustion rule

under § 1983 - particularly in employment discrimination cases.

B. The Most Probative Evidence Demonstrates Congressional Acceptance Of A Flexible Exhaustion Rule

Since Justice Holmes first required 14th Amendment claimants to exhaust non-judicial remedies, Prentis, supra, no Congress has ever amended § 1983 or its jurisdictional counterparts in order to abolish this rule of judicial administration. In primary reliance upon the Court's decision in Lane v. Wilson, supra at 274, most courts applied a flexible exhaustion rule in § 1983 cases at least until McNeese. See generally Comment, 41 Chi. L. Rev., supra at 542 nn.25-26 (citations omitted). Yet, decades of applying a flexible rule produced no statutory changes in § 1983. Despite petitioner's assertions to the contrary, examination of post-McNeese Congresses reveal that the story has

remained the same: Congress has never disapproved of the Court's potential adoption of a flexible exhaustion rule in § 1983 cases.

The legislative history of 42 U.S.C. § 1997e establishes beyond question that Congress listens not only to the Court but to lower courts as well.[19] Despite McNeese and its progeny, (from which petitioner exclusively imputes to their contemporary Congresses' knowledge of an iron-clad no-exhaustion rule), several of

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19 The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (Supp. 1980), served the primary purpose of reversing holdings of the Fourth and Ninth Circuits by conferring standing on the Attorney General "to initiate and to intervene in suits to redress serious and pervasive patterns of institutionalized abuse." H. Conf. Rep. No. 96-897, 96th Cong. 2d Sess. 9 (1980); see also 125 Cong. Rec. H 3638 (daily ed. May 23, 1979) (Rep. Rodino); Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcommittee on the Constitution of the Committee on the Judiciary, 95th Cong., 1st Sess. 364 (1977).

the circuits have long applied flexible exhaustion doctrines, and Congress has specifically failed to codify an iron-clad rule. Unlike petitioner's tautological and sophistical "arguments," this observation enjoys firm evidentiary support.

Beginning at least as early as 1977, both houses of Congress have repeatedly proposed bills to amend § 1983, under the title "The Civil Rights Improvement Act," that would have attempted to preclude the application of flexible administrative exhaustion rules in § 1983 cases.[20] The chief proponent of this legislation in the

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20 See S.1983, 96th Cong., 1st Sess., 125 Cong. Rec. S 15991-96 (daily ed. Nov. 6, 1979); S. 35, 95th Cong., 1st Sess., 123 Cong. Rec. S 124 (daily ed. Jan. 10, 1977); H.R. 7520, 95th Cong., 1st Sess., 123 Cong. Rec. H 5257 (daily ed. April 27, 1977); H.R. 6151, 95th Cong., 1st Sess., 123 Cong. Rec. H 3181 (daily ed. April 6, 1977); H.R. 5535, 95th Cong., 1st Sess., 123 Cong Rec. H 2547 (daily ed. March 23, 1977); H.R. 4514, 95th Cong., 1st Sess., 123 Cong. Rec. H 1756 (daily ed. March 7, 1977); H.R. 549, 95th Cong., 1st Sess., 123 Cong. Rec. H 195 (daily ed. Jan. 6, 1977).

Senate, Senator Mathias, intended not only to reverse some of the Court's abstention decisions and exhaustion decisions in the lower courts, but to preclude the Court from squarely adopting an administrative exhaustion rule - a direction in which Senator Mathias perceived the Court was headed. See 125 Cong. Rec. S 15994 (daily ed. Nov. 6, 1979). This legislation has never passed Congressional muster.[21] As many of the lower courts have continued to apply flexible exhaustion rules in § 1983 cases, it can hardly be argued that Congresses of the late 1970's relied upon and accepted the alleged existence of an iron-clad rule in failing to pass legislation that merely attempted to codify it. Petitioner's "subsequent-congressional-intent" argument

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21 Indeed, these repeated bills to amend § 1983 have failed to get out of committee.

needs no further "beating": The probative legislative history presently reveals it to be a "dead horse" - one which § 1997e did not revisit, let alone revive.

C. § 1997e Does Not Preclude The Adoption Of A Flexible Exhaustion Rule

It would prove ironic, if not unnecessary, for the Court to view § 1997e as "casting in stone" (save for such exceptions as Congress shall make) an iron-clad no-exhaustion rule of judicial administration which never received plenary consideration by the Court nor by the Congress which enacted it.

The origin of § 1997e belies petitioner's argument concerning the allegedly "broad intent of Congress" with respect to exhaustion. Designed primarily to confer standing on the Attorney General to sue, the bill acquired an exhaustion requirement, in the words of Representative

Railsback, one of the bill's chief supporters:

> [a]t the urging, frankly, of the Ford Administration [in recognition of the fact] that there had been too many § 1983 petitions [filed by prisoners], 95% of which were thrown out . . . [and so incentives would be created] to try to motivate the states to set up a grievance mechanism.

124 Cong. Rec. 11982 (1978). Interestingly, despite the Ford Administration's urging, and as an indication of how far the exhaustion issue was from the core of the legislation, neither the bill originally introduced in the Senate nor one of the two bills initially proposed in the House contained the exhaustion provision. Cf. H.R. 5791, 95th Cong., 1st Sess. (1977) with H.R. 2439, 95th Cong., 1st Sess. (1977) and S.1393, 95th Cong., 1st Sess. (1977). Of course, the exhaustion requirement needed justification and the Court's perceived "iron-clad" rule

served that purpose well as petitioner's "many references" attests. Apart from these "political realities" which preceded its enactment, the nature and limited scope of § 1997e and the exhaustion rule Congress adopted undercut the broad implications petitioner advances.

Unlike the many proposed "Civil Rights Improvement Act" amendments to § 1983 of the late 1970's [22] § 1997e never presented Congress with an opportunity to amend § 1983. Thus, it never had cause to consider - let alone adopt and reject - any broader class of claims than those covered by the initially proposed legislation (i.e. adult prisoners). In short, petitioner's argument that Congress was unwilling to go beyond a narrow exception to the exhaustion rule,

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22 See generally Koury, Section 1983 and Civil Comity: Two For The Federalism Seesaw, 25 Loy. L. Rev. 659, 700 (1979).

finds no support in the legislative history of § 1997e. Consideration of the bills never went beyond the proposal that prisoners would need to exhaust. Accordingly, since Congress was not presented with any specific choice concerning exhaustion beyond the prisoner context, it can hardly be argued that Congress "decided" to exempt claims of institutionalized persons other than prisoners let alone broader classes of § 1983 claimants.

Moreover, the "hybrid" exhaustion requirement Congress did adopt hardly demonstrates departure from historical acquiesence in, or acceptance of, flexible rules of judicial administration. This even more restrictive, substantive exhaustion rule clearly cannot be interpreted as a modification or elimination of a perceived flexible rule. For example, it seems clear that the § 1997e exhaustion provisions might often serve to impair, if

not deny, full trial de novo access to federal courts in ways unlike a flexible judicial rule.[23]

Apart from the Act's substantive limitations in access by prisoners to the federal courts, a flexible exhaustion/dismissal rule (which would, at most, defer the exercise of jurisdiction) would in many, if not most cases have no practical functional distinctions from the 90-day deferral rule. In fact, based on these functional similarities, it cannot

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23 Having the stamp of Congressional approval, which Congress did not in "bright line" fashion originate, but which were patterned after the state grievance mechanism in California, see H. Rep. No. 96-80, 96th Cong., 1st Sess. 23 (1979), the administrative procedures may often produce results unfavorable to claimants which, while not technically binding on the Courts, may receive greater weight. Cf. Garcia v. Gloor, 609 F.2d 156, 165 (5th Cir. 1980). Moreover, unless the Courts determine exhaustion is not otherwise "appropriate," certification of the procedures by the Attorney General will automatically cause deferral and, if claimants fail to pursue those procedures, waiver of their § 1983 rights. Cf. McGee v. United States, 402 U.S. 479 (1972).

reasonably be argued that Congress had intended to preempt the former.

First, based on the inherent discretion and "minimum conditions" articulated by the appellate court below, a flexible judicial rule would not offer less protection in terms of defining the "adequacy" of administrative remedies than § 1997e. Indeed, just the contrary seems true as § 1997e does not specifically preclude deferrals in cases of "irreparable injury" as does the flexible rule below.

Second, the 90-day deferral period does not automatically commence upon filing suit. It begins to run once the Court determines that exhaustion would be "appropriate" and the available administrative remedies had received certification or substantially complied with minimum standards. This termination could come months after the initial filing. Moreover, the end of the 90-day period

would not, given crowded dockets, necessarily mean immediate judicial attention. Under a flexible rule of judicial administration, prospective claimants (absent the necessity or appropriateness for immediate federal action) would know that they must pursue adequate administrative remedies of a short duration prior to filing suit. Thus, a flexible judicial rule provides claimants with the potential for much shorter gaps of time between resort to administrative remedies and potential judicial intervention which in most cases could be facilitated by an administrative record.

This is not to suggest that the Board contends that a flexible judicial rule ought to be imposed before resort to the Congressional scheme under § 1997e in appropriate prisoner § 1983 cases. While the breath of the decision below could encompass prisoner claims, this case

obviously need not serve as a vehicle to resolve whether § 1997e's exhaustion scheme could possibly co-exist with flexible judicial exhaustion rules. This potential conflict does not exist in other areas such as allegations of employment discrimination. Indeed, the distinctions between employee and prisoner claims serve to reveal why § 1997e provides "a carrot" as well as "a stick" to promote the adoption of satisfactory grievance procedures and yet another reason why § 1997e should not be viewed as pre-empting flexible judicial rules in other areas.

Third, employees have a much different relationship with state and local governmental agencies than do prisoners convicted of state or local crimes. Further, states have generally prohibited employment discrimination and provided their employees with adequate administrative as well as judicial remedies for

any alleged violations. While some states, e.g., California, were found to have adopted adequate if not "model" administrative remedies for prisoners, Congress primarily found that most state remedies were either inadequate or non-existent. Thus, the need arose to create an incentive for development of such remedies. See S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979); see also H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980); 125 Cong. Rec. S 1717-18 (daily ed. Feb. 26, 1980).

These obvious dissimilarites would have suggested a much greater need for federal court protection of the rights of prisoners than those of employees. Yet, when presented with an opportunity to require prisoners to exhaust adequate state administrative remedies, Congress acted based on such concerns as the fact that "[s]tates [should have]

the primary responsibility for correcting unconstitutional conditions in their own institutions..."[24] and that "a meaningful state grievance procedure would [be] a lot more helpful...to [a] prisoner than a full blown lawsuit under Section 1983."[25] To suggest that this Congressional response has precluded adoption of a flexible exhaustion rule - particularly in state employment and other areas where adequate administrative remedies have long existed - defies not only common sense but the clearly expressed will of Congress concerning the allocation of responsibilities in our federal system for protection of Constitutional rights.

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24 S. Rep. No. 96-416, 96th Cong., 1st Sess. 32 (1979) (emphasis added). See also 125 Cong. Rec. S 6694 (daily ed. May 24, 1979) (Senator Bayh); 124 Cong. Rec. 15445 (1978) Rep. Ertel); Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 H.R. 5791 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 95th Cong. 1st Sess. 109 (1977) (Rep. Danielson).

25 124 Cong. Rec. 11976 (1978) (remarks of Rep. Railsback).

D. Petitioner's "Only Congress Can Act" Policy Arguments Misconstrue The Function Of A Flexible Rule And Ignore The Role The Federal Courts Have Historically And Quite Ably Played In The Application Of Statutory Or Constitutional Law To Individual Cases

To be sure, Congress could, if it so desired, amend § 1983 and superimpose an exhaustion requirement for all cases. However, that Congress could enact such legislation does not mean that it would or should. In any event, petitioner's policy arguments concerning why only the legislative branch of the federal government should act need to be made to Congress - not to the Court confronted with a viable choice for returning § 1983 cases to the mainstream of well-established rules of judicial administration.[26]

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26 This argument ironically presents somewhat of an historical inconsistency - petitioner's counsel and her amici, in opposition to an exhaustion requirement in § 1997e unsuccessfully argued, in part, that the Court had previously exercised its authority and resolved the exhaustion issue in ironclad fashion. See NEA's amicus brief at 12-13 nn.8-9.

Apart from being misplaced, petitioner's policy arguments are largely inaccurate.

Given the "broad swath" cut by § 1983, judicial discretion in the application of all but the broadest and most "bright-line" substantive exhaustion requirements would prove unavoidably necessary. Indeed, petitioner's faith in the ability of Congress to draw "bright lines" that would avoid "uncertainties, inefficiencies, and...litigation of collateral issues" (PB 59) seems ironic given the enormous amount of litigation in the lower courts as well as this Court concerning, for example, the exhaustion scheme under Title II. Petitioner's invocation of the concern by Congress for uniformity fares no better. Congress has long acquiesced in the application of extremely varied state statutes of limitation in § 1983 cases and has mandated that federal courts fill various gaps in § 1983

by reference to varied state laws. 42 U.S.C. § 1988. In any event, proper application of a flexible rule would not create enormous litigation over collateral issues or less uniformity (than already exists) in § 1983 jurisprudence.

Assuming that the substance of a claim is "appropriate" for redress by an administrative procedure which can provide (though need not devine, before its use, the merits of a claim and guarantee) relief, and that no risk of irreparable harm exists, then application of a flexible rule would normally require resort to those procedures. Clearly such a rule need not burden the federal courts with litigation over "new" collateral issues nor impair uniform protection of rights. See FAIR v. McNary, supra 4021 n.8.

Allegations of irreparable injury invoke matters long familiar to the federal courts. See, e.g., Rule 65

Fed. R. Civ. P. Similarly, Congress has vested federal courts with substantial discretion concerning whether suits should proceed as class actions (and possibly, therefore, not be subject to any exhaustion requirements). Rule 23, Fed. R. Civ. P. Moreover, the substance of the claim itself, as revealed in the complaint, and examination of the state's written administrative remedies, would often prove all a court need examine to determine whether to impose an exhaustion requirement in a particular case. Further, while some litigation over collateral issues may unavoidably take place initially, that litigation will decrease over time based on salutary principles of stare decisis. Finally, since the federal courts would in all cases remain available to pronounce the final results, any disparities in local and state administrative schemes

would not impair uniform protection of Constitutional rights.

IV. THOUGH PREMATURE, AN ANALYSIS OF THE ADMINISTRATIVE REMEDIES AVAILABLE TO PETITIONER DEMONSTRATES THEIR ADEQUACY, APPROPRIATENESS, AND SIMPLICITY.

Pursuant to its efforts to protect the civil rights of its employees,[27] the State of Florida has established adequate "other proper proceedings" by which a claimant may remedy employment discrimination. The administrative remedies available to petitioner are neither onerous, nor illusory; they were, in fact, specifically designed to provide fair, efficient and prompt redress. Given the factual matters raised by petitioner's contrary assertions, the Court need not

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27 The Constitution of the State of Florida extends protection to all natural persons. Article 1, Declaration of Rights, Constitution of Florida. In addition, a statutorially mandated employment policy governs all state agencies functioning as employers. Fla. Stat. Ann. § 110.105(2); see also Fla. Stat. Ann. § 112 (affirmative action policy).

address them in the first instance. Dothard v. Rawlinson, 433 U.S. 321, 323 n.1 (1977). However, the nature of petitioner's potential administrative remedies are a matter of public record.[28]

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28 First, petitioner may seek redress of her grievance through the Human Relations Commission, established by the Human Rights Act of 1977, as amended, Chapter 23, Part IX, Fla. Stat. (Chapter 9D-9, F.A.C., establishes rules governing proceedings before the Human Relations Commission).

Second, in the alternative, as a career service employee of FIU, petitioner may utilize procedures set forth at Chapter 6C8-4.05, F.A.C. See also PA 53a-54a. In addition, a claimant could also appeal a final order resulting from these procedures where non-compliance with the procedures is alleged. Chapter 22A-10.01, et seq. F.A.C.; see also, Chapters 22M and 22K, F.A.C.

Third, pursuant to Chapter 22A-7.12, F.A.C., all state agencies must comply with Florida's Administrative Procedure Act, codified at Fla. Stat. Ann. § 120. A formal proceeding is required whenever the substantial interests of an employee are adversely affected by agency action and there is a disputed issue of material fact. Fla. Stat. Ann. § 120.57(1). See also, Dickerson v. Rose, 398 So. 2d 922, 925 n.4 (Fla. 1st Dist. Ct. App. 1981). As noted in Ex Rel., Dept. of General Services v. Willis, 344 So. 2d 580, 592 (Fla. 1st Dist. Ct. App. 1977): "The proper way for a substantially affected person to invoke a formal or informal 120.57 hearing is simplicity itself: he asks the agency for it."

These agency procedures provide an orderly system of review and appeal for alleged employment discrimination and on their face meet the "minimum conditions" delineated by the appellate court below.[29]

Unlike the "remedies" scheme in McNeese, which afforded only "tenuous protection" (because of numerical requirements imposed on the claimants and because the Superintendent could only "investigate, recommend and report"),[30] the administrative remedies, noted supra n.28,

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29 See, note 3, supra, PA 50a.

30 Indeed, in McNeese in their appellate brief the ACLU argued, in part, that the only available remedy was judicial - not administrative. See, PB 18 n.12. Cf. Fla. Stat. Ann. § 127.167(13). See also Brief In Opposition To Petition For Writ Of Certiorari at 20-22; Fla. Stat. Ann. § 120.68(1), "[a] preliminary, procedural, or intermediate agency action is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Also, contrary to petitioner's assertion at PB 80, an employer is not entitled to a trial de novo. Fla. Stat. Ann. § 120.68(4).

on their face, provide an efficient, fair, and simple mechanism for relief from alleged employment discrimination commensurate with that requested in petitioner's § 1983 claim.[31] Parratt v. Taylor, supra at 4513 (1981); FAIR v. McNary, supra at 4026-4027 n.24 (1981) (Brennan, J., concurring) (recognizing that unavailability of compensatory or punitive damages would not automatically preclude resort to administrative remedies).

As petitioner recognizes, see PB 77 n.67, she is free to file her complaint in the first instance with the Human Relations Commission, Fla. Stat. Ann. § 23.167(11). If no satisfactory resolution is forthcoming within 180 days, she is then clearly free to resort

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31 Petitioner clearly recognizes that she could have proceeded through FIU's career service employee grievance procedure and exhausted those remedies within 75 days. PB 85. As petitioner also recognizes, under these proceedings she could have received the relief which she is seeking - promotion. PB 88.

to a judicial forum.[32] Fla. Stat. Ann. § 23.167(12); PB 86 n.72. Though, perhaps for tactical reasons, petitioner chose to characterize the above facts as a "technical matter," see PB 77 n.67, her attempts at obfuscation only highlight the nature of her present "plight": her administrative remedies are adequate, appropriate, and, in fact, quite simple. Petitioner's participation in the administrative process after 180 days is clearly optional, though probably beneficial,

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32 Fla. Stat. Ann. § 23.167(12). Indeed, Congress has explicitly approved a 240 day deferral period when claims of employment discrimination are alleged against private and state employers in deferral states. 42 U.S.C. § 2000e-5(b) (1979). In addition, the incentives are clearly on the state, as employer, to fully and fairly investigate and resolve valid complaints within this time frame.

given the present backlog of cases in the federal courts.[33]

Finally, petitioner's "futility" argument, PB 87-88, clearly involves factual matters which are best developed at trial. For example, what was the true nature and extent of this meeting? Was petitioner, perhaps, directed to utilize her available administrative remedies? The mere allegation that a one hour meeting took place after which four months elapsed without producing a satisfactory response proves little, if anything. Any meaningful conclusion derived from this meeting hinges on facts not in the record. In addition, even assuming petitioner had sought relief through the university

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33 As reported in the Florida Commission on Human Relations Annual Report 1980-81, the Commission has resolved 3,533 (41%) of all employment discrimination claims it has received since its creation in 1978, resulting in monetary awards to plaintiffs totalling over one million dollars. In fact, 61% of these claims were resolved at intake.

administrative process on the date she filed her federal court action, a different university President would have, in fact, reviewed her claim, Dr. Harold Crosby. Presently, there is yet another individual holding that position, Dr. Gregory Wolfe. Thus, there is absolutely no evidence that, upon remand, petitioner's exhaustion of her administrative remedies would be "futile." In any event, this remedy is only one of several available.

CONCLUSION

For the foregoing reasons the Board respectfully submits that the Court can, and for most compelling reasons should recognize that as we approach the 21st Century, this nation's § 1983 jurisprudence can, if not must, accommodate a flexible exhaustion rule. As our history records, this Court's wisdom has

well-served the changing needs of our federal republic while faithfully assuring the protection of constitutional rights. It would prove ironic, unnecessary and costly if this flexible and salutary course of history were altered because of a wooden and anachronistic interpretation of one of the chief instruments that enabled it to be written. Indeed:

> [o]ne of the strenghs of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the [state half] of that protection is [prematurely and unnecessarily removed].[34]

The Board respectfully prays that the judgment below be affirmed.

Respectfully submitted,

JEFFREY H. KLINK

Counsel of Record

MITCHELL D. FRANKS

Counsel for Respondent

January, 1982

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34 Brennan, State Constitutions And The Protection Of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

AVIAM SOIFER
23 Irving Street
Cambridge, MA 02138
(617) 547-2865

STEVEN R. SHAPIRO
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

JOEL M. GORA
645 West End Avenue
New York, New York 10025
(212) 874-5791

CHARLES S. SIMS
Counsel of Record
BRUCE J. ENNIS, JR.
E. RICHARD LARSON
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioner

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STATEMENT

Respondents' brief rushes headlong past precedent, history, and basic rules of statutory construction to argue what it calls "most persuasive" policies.[1/] The principal question in this case, however, is not whether the Court should adopt respondents' notions of sound public policy, but what § 1983 requires.[2/]

1/ Respondents' Brief ("RB") 7.

2/ As in petitioner's opening brief, "exhaustion" will be used to refer to required exhaustion of state and local administrative remedies under § 1983. The "flexible exhaustion rule" benignly extolled in respondents' brief bears little relation to the exhaustion rule adopted by the court below, or applied subsequently in the Fifth Circuit. See, e.g., PB 26, 68-72. In a First Amendment case involving an Alabama state employee allegedly fired for complaining to state legislators, the Fifth Circuit recently held that an administrative procedure would be deemed adequate under Patsy so long as it meets constitutional requirements for a post-termination due process hearing. Bradford v. Bronner, No. 80-7591 (Jan. 11, 1982), slip op. at 14164. That is "flexibility" with a vengeance and far more restrictive than the exhaustion requirement observed in the Second Circuit, which retains

(footnote continued on following page)

Respondents' reliance on policy arguments cannot disguise their inability to justify dispensing with a rule applied or relied on in sixteen of this Court's cases over two decades; their failure to demonstrate that this Court's consistent construction of § 1983 was wrong as a matter of legislative intent; and their disregard of congressional approval of and reliance on the non-exhaustion rule.

Although most of the points raised in respondents' brief are adequately addressed in petitioner's opening brief, a few merit brief reply.

(footnote continued from preceding page) inter alia a criterion of speed. See Swan v. Stoneman, 635 F.2d 97 (2d Cir. 1980). Compelling federal courts to decide an additional constitutional issue and to scrutinize the adequacy of state procedures in every § 1983 case is hardly a means to reduce federal-state friction.

I. PRECEDENT AND HISTORY CONFIRM THAT SECTION 1983 DOES NOT REQUIRE EXHAUSTION

A. In her opening brief, petitioner showed that five cases applying the non-exhaustion rule, all either unanimous or 8-1, were the product of reasoned decision, tested against the careful dissents of Justice Harlan and a celebrated attack on the rule by Judge Friendly in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969). Brief for the Petitioner ("PB") 17-18.[3/] Apart from complaining that even that showing does not establish what went on during this Court's deliberations on the issue (RB 35), respondents have not disputed that their position was squarely before the Court in McNeese and its progeny, particularly in Carter v. Stanton,

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3/ See also King v. Smith, 392 U.S. 309 (1968), inadvertently omitted from petitioner's opening brief.

405 U.S. 669 (1972). See PB 18 n.12.[4/]

Respondents nonetheless suggest that the non-exhaustion rule is not firmly established, arguing that this Court has never considered several of the reasons advanced by the court below for adopting a flexible rule, e.g., disparate treatment of state and federal defendants, federalism and comity, and Article III "ripeness" (RB 37). Justice Harlan's dissents in McNeese and Damico, however, and Judge Friendly's opinion in Eisen, squarely considered the federalism and comity arguments. Section 1983 cases pose no unique

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4/ During oral argument in Carter v. Stanton, appellants explained that the Court's prior decisions established "an absolute exemption from any exhaustion requirement," citing Damico v. California, 389 U.S. 416 (1967) and King v. Smith, 398 U.S. 309 (1968). O.T. 14. Appellees conceded that McNeese had held that "under § 1983 you did not have to exhaust administrative remedies", but urged, as respondents urge here, that that case be limited to its facts involving inadequate remedies. O.T. 32-33. See also O.T. 29, 47-48; Brief for Appellee Stanton 28-33.

ripeness problems. Federal courts have had no problem disposing of non-ripe § 1983 cases -- or other cases -- without relying on administrative screening, which deals with quite a different problem.[5/]

5/ E.g., Rizzo v. Goode, 423 U.S. 362, 372 (1976); O'Shea v. Littleton, 414 U.S. 488, 493-96 (1974). The distinction between ripeness and exhaustion, and the reasons why the two should not be confused, are ably discussed in United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1232-33 (3rd Cir. 1977). As in Lightcap, because plaintiff has alleged that a violation of constitutional rights has already taken place, the matter is plainly ripe. The contention that no constitutional violation has taken place until the actions of university officials are expressly ratified by the Board (RB 29-30, Brief for Washington et al. 18-21) was expressly rejected by this Court seventy years ago, Ex Parte Young, 209 U.S. 123 (1908), and has been repeatedly rejected since. E.g., Chardon v. Fernandez, 50 U.S.L.W. 3341 (1981)(limitations period for allegedly discriminatory decision runs from date decision made); Monroe v. Pape, 365 U.S. 167, 172-87 (1961).

The related argument that exhaustion is required here because the defendants are not the parties "responsible" for plaintiff's harm also lacks merit. See RB 27-30. Even assuming arguendo that plaintiff has sued the wrong defendants (a question not before this Court), the proper procedure is a motion to dismiss for failure to state a claim, not the imposition of an exhaustion requirement. Administrative proceedings are not likely to shed light on the issue of who, under

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The suggestion that disparate treatment of state and federal defendants in cases involving violations of constitutional rights raises constitutional problems is without support in any of this Court's decisions. See Brown v. GSA, 425 U.S. 820 (1976).

B. Unable to undermine the firm foundations of the non-exhaustion rule, and without any acknowledgement of the heavy burden they must meet in light of this Court's precedents, Illinois Brick Co. v. Illinois, 431 U.S. 720, 736-37 (1977), respondents urge that McNeese and its

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the facts of this case, Florida law, and § 1983 jurisprudence, is "responsible" for plaintiff's harm. For example, if petitioner had exhausted and named the university in the administrative proceedings, the university could apparently still not be sued consistent with Florida law under § 1983. JA 25-27. Similarly, an unsuccessful administrative proceeding against the Board would not render Board members responsible for primary conduct they had not "caused". See Monell v. Dept. of Social Services, 436 U.S. at 692-94.

progeny be overruled. RB 39-43. Only parts of their argument require response.

One of the four factors identified in Monell v. Department of Social Services, 436 U.S. 658 (1978), as bearing on the propriety of departure from stare decisis is whether overruling would "be inconsistent with recent expressions of congressional intent." 436 U.S. at 696. Addressing this factor, respondents provide only a string citation for the irrelevant proposition that the views of subsequent Congresses are of limited value in statutory construction. RB 40. Those cases are inapposite here, however, because they bear on how initially to interpret a statute, not, as this part of the Monell test inquires, whether subsequent Congresses have relied on an earlier judicial construction. Petitioner has examined recent expressions of congressional intent precisely as the

Court did in Monell, by looking at recent legislative activity. That examination, uncontradicted by respondents, shows what was not shown in Monell, namely congressional reliance on this Court's prior rulings. Compare Monell, 436 U.S. at 697-99 with PB 23-25, 42-46, 51-56 and Brief for NEA et al. 10-17.[6/]

With regard to the final Monell factor, whether the prior decision was wrong "beyond doubt", it is sufficient simply to observe that respondents provide no evidence whatsoever to contradict the extensive historical research marshalled in petitioner's brief and those of her

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6/ Particularly telling is respondents' failure to address in any way the impact of the 1979 amendment to § 1983. See PB 44-45. Under settled rules of construction, Congress' amendment of § 1983 in other respects, but failure to alter that well-known construction, means that "the legislative intent has been correctly discerned". United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979).

amici.[7/] In light of that historical showing, the non-exhaustion rule is plainly correct.

II. CONGRESSIONAL ACTION CLEARLY PRECLUDES AN EXHAUSTION REQUIREMENT

Petitioner has previously demonstrated that Congress, when it decided to require exhaustion only in a limited class of selected § 1983 cases, and then only under carefully controlled conditions, was fully aware of the non-exhaustion rule, objections to it from the states, and problems allegedly arising from an increase in § 1983 filings. Respondents' confused

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7/ Compare RB 19-24, 41 with PB 30-39; Brief for the NEA et al. 18-24; Brief for the NAACP Legal Defense Fund passim. Respondents' assertions that "Congress in 1871 could not have intended to require prior resort to state administrative agencies" (RB 21) and that petitioner's historical argument is anachronistic are plainly wrong. Clyde v. United States, 80 U.S (13 Wall) 38 (1871); The Collector v. Hubbard, 79 U.S. (12 Wall) 1 (1871). See generally Brief for NEA et al. 21-24; Brief for NAACP Legal Defense Fund 22-30.

arguments ignore, or simply fail to understand, what Congress has said and done.

A. To emphasize, as respondents do (RB 43-46), that there is a difference between jurisdictional exhaustion requirements imposed by Congress and judicially-imposed exhaustion is not to say, as they seem to, that courts retain untrammelled power to require exhaustion regardless of congressional intent. See, e.g., RB 57-58.

Similarly, that courts imposed administrative exhaustion in rate regulation cases without legislative guidance at the turn of the century hardly suggests that they should suddenly do so now in § 1983 cases, ignoring the fundamental importance Congress originally and subsequently ascribed to prompt access to a federal judicial forum under § 1983. Compare RB 43-46

with PB 30-46.[8/]

Apparently conceding that Congress does have a leading role to play, respondents make the peculiar argument (RB 48) that "Congress has never disapproved of the Court's potential adoption of a flexible exhaustion rule in § 1983 cases". That assertion refutes itself. Congress does not have a practice of disapproving decisions this Court has not yet reached. Congress does, of course, routinely disapprove of decisions already reached with

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8/ For no apparent reason, respondents treat employment discrimination cases as a special category of § 1983 cases, arguing that "particularly" in this area Congress has not precluded "a flexible exhaustion rule". RB 46-47. In fact, of course, to the extent that Congress has required exhaustion in Title VII, and made clear that those procedures do not apply to the post-Civil War remedies (PB 42-44), congressional action strongly militates against judicial imposition of an exhaustion requirement. See Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240-269 (1975); Northwest Airlines, Inc. v. Transport Workers, 67 L.Ed. 2d 750, 766-67 (1981).

which it disagrees. As we have shown, Congress has never disagreed with McNeese and its progeny despite knowledge and understanding of the non-exhaustion rule, and notable opportunity to reconsider it. See supra n.6.[9/]

The argument that § 1997e "never presented Congress with an opportunity to amend § 1983" (RB 53) is empty formalism. Notwithstanding its codification, § 1997e is in fact nothing but an amendment of § 1983, altering the procedural framework under which certain § 1983 claims may be brought. Indeed, as petitioner

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9/ Petitioner's reliance on statutes passed in 1964, 1972, 1979, and 1980, and the legislative history of those statutes, should be sharply distinguished from respondents' reliance on a series of bills that were never passed, or even seriously considered in committee. Compare PB 42-48 with RB 47-51. Congressional intent is properly sought by examining what Congress has enacted and said in the enacting process, not by examining bills that never received consideration. See e.g., United States v. Southwestern Cable Co. 392 U.S. 157, 170-171 (1968)(unsuccessful attempt to seek confirmation of a claimed power not probative of congressional intent); United States v. Wise, 370 U.S. 405, 411 (1962).

showed, the debate concerning § 1997e focused squarely on § 1983, canvassed many of the factors respondents now urge for imposing such a requirement, and rejected the need for such wide-ranging reform. PB 51-56.

B. Respondents' attenuated response to petitioner's argument concerning § 1997e itself (RB 51-60) simply ignores what Congress has actually done, and the impossibility of squaring a generally applicable § 1983 exhaustion rule with § 1997e.

1. The non-exhaustion rule was not only expressly relied on by § 1997e's sponsors;[10/] it was the principal just-

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10/ Respondents do not dispute our showing that Congress knew of the non-exhaustion rule (PB 51-52), and apparently concede its accuracy. See RB 52-53. Amici States have no rebuttal to our showing in this regard except to call
(footnote continued on following page)

ification for enacting § 1997e, and the indispensable predicate for its success. The elaborate certification procedures established by Congress in § 1997e only make sense upon the assumption that exhaustion is not now required under § 1983 and cannot be judicially imposed. Otherwise, states would have no incentive to accept the "carrot" held out to them and to adopt grievance procedures capable of certification under § 1997e, since all prisoner § 1983 cases could already be diverted to state administrative agencies under traditional exhaustion rules. Acceptance of respondents' position would

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(footnote continued from preceding page) Representative Butler's statements "simply in error" (Br. for Washington et al. 12 n.4), and to ignore the numerous statements to the same effect by § 1997e's sponsors and Assistant Attorney General Drew Days, cited in petitioner's brief (PB 23 n.17 and 52 n.47). See also Brief for NEA et al. 10-13.

render § 1997e a dead letter -- a wholly untenable result. See, e.g., Mercantile National Bank v. Langdeau, 371 U.S. 555, 560 (1963).[11/] The difficulty of reconciling a radical change in settled exhaustion law under § 1983 with § 1997e underscores both the importance of leaving to Congress any alterations of remedial procedures that Congress has designed or addressed, and also the significance of the

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11/ As petitioner has shown without contradiction, the legislative history demonstrates congressional knowledge and intention that many § 1983 claims of state prisoners -- all those arising in uncertified institutions, and all those unrelated to conditions of confinement -- could not be subjected to exhaustion of even plain, speedy, and effective remedies. See PB 54.

It would be equally violative of congressional intent, of course, to provide the necessary inducement by exempting prisoners in uncertified prisons, or those with claims unrelated to conditions of confinement, from a general exhaustion requirement suddenly applicable to all other § 1983 claims. See Brief for Washington et al. 12 n.4. Nothing in the legislative history supports that result.

failure of respondents (RB 51-60) and amici States (Brief for Washington et al. 12 n.4) to address or distinguish in any way the cases embodying that doctrine.[12/]

III. POLICY QUESTIONS CONCERNING EXHAUSTION ARE FOR CONGRESS TO RESOLVE

A. Respondents' brief fails to address petitioner's arguments that § 1983 cases differ from most other federal statutory cases because an exhaustion requirement could not be predicated on "the proper functioning of [a] particular administrative scheme Congress has constructed", McGee v. United States, 402 U.S. 479,

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12/ E.g., Alyeska Pipeline Service Co. v. Wilderness Society, 427 U.S. 240, 269 (1975), and Northwest Airlines, Inc. v. Transport Workers, 67 L.Ed. 2d 750, 766-67 (1981). See generally PB 48-49, 56-58. Respondents ironically argue that the exhaustion requirement adopted below would generally "have no practical functional distinctions" from the § 1997e practice, a contention which highlights the Fifth Circuit's usurpation of the legislative role.

483 n.6 (1972), and that the policy relied on by the Court below is either inappropriate for judicial consideration (i.e., crowded dockets) or subject to vigorous dispute by commentators and courts. See generally PB 59-65. Instead, respondents simply present, ably but irrelevantly, one side of precisely those much-disputed policy judgments. No justification whatsoever is advanced to support this Court's resolution of questions institutionally entrusted to Congress.

Respondents' attempt to analogize civil rights cases to other areas where exhaustion has been required also ignores § 1983's historical origins. As petitioner has shown without contradiction, the 42nd Congress enacted § 1983 out of a profound mistrust of "States and their institutions, tribunals and functions."[13/]

13/ Congressional Globe, 42nd Cong., 1st Sess. 365 (Rep. Arthur). See generally PB 31-35.

Congress expressly patterned § 1983 on the patterns of federalism relied on in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), under which federal courts enforced federal rights without intervention by state institutions. PB 34-35. In light of the history petitioner and her amici have set forth, an exhaustion rule created for rate regulation cases where Congress evidenced no hostility to or lack of faith in governmental agencies cannot be blindly transferred to civil rights claims against state and local officials. History and the statutory language it produced require adherence to the non-exhaustion rule until and unless Congress amends it. Diamond v. Chakrabarty, 447 U.S. 303 (1980). The Constitution's express grant of power to Congress to "enforce" the Fourteenth Amendment, U.S. Const.,

Art. XIV, § 5, pursuant to which § 1983 was enacted, underscores the appropriateness of congressional resolution of the policy questions raised by exhaustion.

B. Because the conflicting policies implicated in the exhaustion issue are so clearly matters for congressional choice in light of § 1983 and its subsequent history, we will not burden the Court with a full rebuttal to the policy arguments respondents copiously urge.[14/] The contention that embarking the judiciary on the Fifth Circuit's path would not soon exhaust it with the uncertain-

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14/ RB 12-34; see also Brief for Washington et al. 3-6, 18-20. For policy arguments supporting the non-exhaustion rule in § 1983 cases, see e.g., Preiser v. Rodriguez, 411 U.S. 475, 513-524 (Brennan, J., dissenting); Comment, Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum. L.Rev. 1201 (1968); and the dissenting opinions below (JA 62a-69a, 102a-120a).

ties, inefficiencies, and collateral issues that case-by-case development of an exhaustion requirement for § 1983 cases would necessarily entail, however, requires brief response.

Respondents concede that implementation of a general exhaustion requirement for § 1983 cases will inevitably require extensive judicial discretion because of the enormous variety of claims and agencies to which § 1983 applies. RB 62. Far from supporting respondents' position, however, that very variety suggests precisely why Congress has not generally required exhaustion for § 1983 claims, and why Congress has instead begun to address the exhaustion question one step at a time, after careful study. When a legislature addresses an issue incrementally, it is not for courts to alter and extend what Congress has done.

See PB 48-49, 56-58. Cf. Minnesota v. Clover Leaf Creamery Co., 66 L.Ed. 2d 659 (1981); Califano v. Jobst, 434 U.S. 47, 57 (1977); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

IV. THE AVAILABLE ADMINISTRATIVE REMEDIES ARE INADEQUATE ON THIS RECORD

If Florida's laudable "efforts to protect the civil rights of its employees" (RB 65) could produce fair results more quickly than § 1983 cases in federal court, attorneys would undoubtedly choose to pursue state procedures. As petitioner has shown, however, Florida's labyrinthine procedures epitomize the sorts of inadequate procedures federal courts have never required plaintiffs to exhaust.[15/]

15/ Logic suggests and counsel's experience confirms that literally thousands of individuals with potential § 1983 claims successfully pursue state or local administrative procedures. See also Brief for National Legal Aid and Defender
(footnote continued on following page)

A. Petitioner has previously set forth in abbreviated form the procedures available to her under Florida statutory law. PB 74-80. Although respondents' discussion of those procedures is somewhat obscure (RB 66-69), we understand them to concede its accuracy entirely except in two respects, involving the questions whether an employer is entitled to a trial de novo in a state court enforcement action, and whether a complainant may enter a judicial forum as of right 180 days after filing her complaint with the Human Relations Commission. Even if

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(footnote continued from preceding page) Association 7-8. Although these have proved difficult to document (such administrative decisions are typically not reported), it is difficult to believe -- unless self-interest plays no part in such decisions -- that individuals are submitting themselves to the costs of federal (or state) § 1983 lawsuits when comparable results may be had expeditiously and fairly in administrative agencies.

respondents were correct as to these two matters -- in fact, they are rather plainly wrong -- the scheme as sketched in petitioner's opening brief is inadequate as a matter of law for the reasons we previously outlined. PB 80-95.[16/]

16/ Citing Fla.Stat.Ann. § 120.68(4), respondents disingenuously contend that "an employer is not entitled to a trial de novo". RB 67 n.30; compare PB 80 & n.68. For a complainant who prevails in the Human Relations Commission, however, which respondents implicitly concede has no enforcement powers, the provision providing access to the courts is not § 120.68, but § 120.69, which authorizes (but does not require) "an agency seeking enforcement" or a "substantially interested person" to institute an enforcement action in state court. See PB 80. Under § 120.69(5), "the respondent may assert as a defense the invalidity of any relevant statutes, the inapplicability of the administrative determination to respondent, ... the inappropriateness of the remedy sought by the agency ... [or] the invalidity of the agency action."

Similarly erroneous, or at least misleading, is respondents suggestion (RB 68-69) that exhaustion will not take longer than six months because petitioner could "file her complaint in the first instance with the Human Relations Commission" and would be "clearly" entitled to resort to a state court 180 days later. As respondents are aware (see RB 68 n.31), Florida rules establish an initial grievance procedure in the university (footnote continued on following page)

B. Respondents have largely failed to respond to petitioner's demonstration that the available remedies are inadequate. See RB 67-70. Only three points require comment.

1. With regard to respondents' unsuccessful attempt to distinguish McNeese (RB

(footnote continued from preceding page)
of at least seventy-five days separate from and in addition to the Human Relations Commission. PB 75-77. For those who choose to seek relief initially at the university level, the administrative procedures terminate only after the additional Human Relations Commission procedures are pursued as well. Although a complainant theoretically "is free" to file initially with the Human Relations Commission (RB 68), Fla.Stat.Ann. § 23.167(11) authorizes the Human Relations Commission to remand a complaint (either at will or by rule) to the agency involved (i.e., the University). See PB 77 n.67. The pertinent statutory provisions do not indicate whether the university must operate within strict time limits in those circumstances, and do not indicate that a complainant whose grievance is so referred may enter a judicial forum after 180 days as if her complaint had never been referred. See § 23.167 (12).

67), nothing in their brief contradicts our showing that the Human Relations Commission has precisely the "tenuous" and ineffective power possessed by the Superintendent in McNeese: even if the Human Relations Commission agrees that constitutional rights have been violated, it may only petition a state court for relief. See PB 88.

2. Although respondents contend that the Florida procedures provide for relief "commensurate with [the relief] requested in petitioner's § 1983 claim" (RB 68), they never explain what relief is in fact available, and do not deny that Florida's procedures are wholly unable to award damages petitioner seeks. See PB 82 & n.70. That inadequacy alone renders the available procedures inadequate. Id.

3. Finally, citing a general provision of Florida administrative law, respondents appear to dispute our contention that no evidentiary hearing is available at the university level. Compare RB 66 n.28 with PB 75-76, 83. They are not convincing. The provisions of the Administrative code, cited in our opening brief, make no reference to hearings at that stage, and are so detailed as to suggest that the authorities relied on by respondents do not apply. Moreover, the hearing contemplated by the authorities relied on by respondents may well be satisfied by the later hearing specifically provided for in the analogous administrative code provisions governing the Human Relations Commission. See PB 79. In any event, the remedy is so uncertain and its structure in such doubt that, as in McNeese, it cannot be con-

sidered adequate. See generally PB 88-90.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

CHARLES S. SIMS
Counsel of Record
BRUCE J. ENNIS
E. RICHARD LARSON
AVIAM SOIFER
STEVEN R. SHAPIRO
JOEL M. GORA

Attorneys for Petitioner

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No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

Attorneys for Amicus Curiae:
FRED E. INBAU, ESQ.
Chairman of the Board, Americans for Effective Law Enforcement, Inc.
40 East Oak Street
Chicago, Illinois 60611
WAYNE W. SCHMIDT, ESQ.
Executive Director,
Americans for Effective Law Enforcement, Inc.
501 Grandview Drive
South San Francisco, California 94080
JAMES P. MANAK, ESQ.
General Counsel,
Americans for Effective Law Enforcement, Inc.
33 North LaSalle Street,
Suite 2108
Chicago, Illinois 60602

Of Counsel:
WILLIAM E. HORNSBY, JR., ESQ.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Charles E. Sims, American Civil Liberties Union, Counsel for Petitioner, and by Jeffrey H. Klink, Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), as a citizens group, is interested in establishing a body of law making the police and correctional efforts more effective, in a constitutional manner.

AELE is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in

its by-laws, one of the purposes of AELE is to assist the police, the prosecution and the courts in promoting a more effective and fairer administration of the criminal justice system.

In furtherance of this objective, AELE seeks to represent, nationwide, the concern of the average citizen with the problems of crime, police effectiveness to deal with crime, and the effectiveness of correctional administrators in working with prisoners. It also provides legal research assistance in support of responsible law enforcement and correctional activities, principally through the *amicus curiae* process in the courts.

Americans for Effective Law Enforcement, Inc. steadfastly opposes racial and sexual discrimination of any and all types. Our interest in this case arises not from its specific facts, but from the importance of effective correctional administration and the adverse impact that an unnecessarily broad interpretation of 42 U. S. C. § 1983 will have on the effectiveness of our prison systems and the federal courts. We are also concerned with employment matters involving the police. It is generally recognized that the number of law enforcement officers challenging their superiors on relatively minor matters in § 1983 actions, rather than utilizing established administrative grievance procedures, is growing rapidly and threatens to undermine the stability of our law enforcement agencies.

While the instant case obviously does not involve a prisoner civil rights or police employment suit, cases founded on § 1983 have been applied as precedent to such suits regardless of the subject matter. *Amicus* believes it is imperative that the Court take the current status of prisoner civil rights suits and other law enforcement matters into consideration when hearing any case involving § 1983. When reaching a decision on the law founded on this statute, *amicus* respectfully requests the Court to consider the policy issues, in particular the possible adverse effect of any further deterioration of the exhaustion doctrine in § 1983 suits.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

On February 7, 1979, Petitioner Patsy filed a complaint in the United States District Court for the Southern District of Florida, alleging that the Respondent had denied her employment opportunities solely because of her race and sex. Injunctive relief and damages were sought pursuant to 42 U. S. C. § 1983.

Respondent moved to dismiss the complaint because plaintiff had failed to exhaust available administrative remedies. On July 9, 1979, the District Court granted the motion to dismiss.

On appeal, a panel of the former Fifth Circuit Court of Appeals reversed the District Court and remanded. The former Circuit Court subsequently granted Respondent's motion for a rehearing *en banc* and reversed the panel, upholding the District Court. Petition for a writ of certiorari to the newly-organized United States Court of Appeals for the Eleventh Circuit was filed, which petition was granted.

ARGUMENT

ABOLITION OF THE EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT IN § 1983 CASES, WHERE ADEQUATE ADMINISTRATIVE PROCEDURES ARE AVAILABLE, WOULD BE CONTRARY TO JUDICIAL ECONOMY AND SOUND PUBLIC POLICY.

As noted in the Interest of Amicus section, *supra*, AELE is vitally concerned with the anticipated deleterious effect of a holding creating a no-exhaustion requirement in § 1983 cases, and in particular the impact of frivolous prisoners' suits on the federal judiciary. While § 1983 cases include a plethora of subject matter, opinions in one type of case are often viewed by the lower courts as precedent in all § 1983 cases. It is, therefore, the intent of *amicus* to present the Court with arguments from the point of view of sound criminal justice administration in regard to exhaustion of administrative remedies in § 1983 cases.

As is the custom of AELE when appearing as *amicus curiae* before this Court, we will not repeat at length the legal arguments made by the Respondents in this case. Concerning the legal analysis of the issues in this case, we regard the majority opinion by Circuit Judge Roney to be exceptionally well-reasoned and comprehensive. *Amicus* readily endorses this opinion and refrains from repeating it as well.

Traditionally, state prisoners have preferred the federal court as a forum for the redress of grievances by bringing habeas corpus actions pursuant to 28 U. S. C. § 2254 (1976). However, in growing numbers these convicted criminals have expressed their preference for § 1983 suits. Such actions allow for equitable relief, see *Taylor* v. *Perini*, 413 F. Supp. 189 (N. D. Ohio 1976) and *Collins* v. *Schoonfield*, 344 F. Supp. 257 (D. Md. 1972); as well as money damages, *see Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971), *cert. den.*, 404 U. S. 1049 (1972), and *Basista* v. *Weir*, 340 F. 2d 74 (3d Cir. 1965). And, since this Court's decision in *Lynch* v. *Household Finance*

Corp., 405 U. S. 538 (1972), there is no minimal jurisdictional amount for civil rights property claims.

Additionally, § 1983 actions are preferred to habeas corpus relief because the civil discovery procedures are liberal and class actions are permitted. However, as one commentator has noted:

> The most important advantage section 1983 has over the habeas corpus action is that the prisoner need not exhaust his state judicial or administrative remedies prior to bringing his suit in federal court. In direct contrast, the habeas corpus statute explicitly requires a prisoner to exhaust available state remedies prior to seeking federal judicial relief. (footnotes omitted) 11 Cumberland Law Review 369 (1980).

These procedural advantages, and the lack of any meaningful procedural restraints, have resulted in an almost geometric increase in federal court caseloads. Prior to analyzing specific data and cases which illustrate this point, *amicus* asks the Court to consider the following observations from nearly a decade ago.

In 1973, Judge Ruggero J. Aldisert stated:

> [P]risoners' petitions continue to inundate the federal courts, pathic handwritten grievances; some very real; some rather illusory; some with genuine constitutional issues; some merely stating disagreements with administrative decisions. This litigious flood consumes many judicial manhours and challenges the abilities of federal courts to cope with their own calendars. Mr. Justice Powell's recent statement concerning state habeas corpus in the federal system is equally applicable to prisoners' civil rights claims: "The current flood of petitions . . . already threatens—because of sheer volume—to submerge meritorious claims and even to produce a judicial insensitivity to . . . petitioners." 1973 Law and Social Order 557, 566.

The following year, Chief Judge Northrop, in the District Court's opinion in *McCray* v. *Burrell*, 367 F. Supp. 1191 at 1196

(D. Md. 1973), squarely addressed the problem that the current system has created when he stated:

> This Court is not implying that all prisoner civil rights suits are without merit, or that penal institutions . . . are without sin. But it is suggesting that these suits will continue to consume more and more of the federal courts' time, with the result that it will take longer and longer to provide relief for those prisoners who are actually being deprived of their rights.

The statistical data readily illustrates the apprehensions expressed by many jurists. The yearly increases in the number of prisoner civil rights actions have been staggering. In 1966, there were 218 civil rights suits brought by state prisoners. By 1972, this number had grown to 3,348 suits, or a 1,536 per cent increase! In 1972, there were a total of 96,173 civil suits filed in the federal district courts. Seventeen per cent, or 16,267, of these actions were prisoner petitions, including habeas corpus and civil rights act filings. 1973 Law and Social Order 557 at 567. Furthermore, prisoners' petitions account for a dramatically disproportionate increase in the federal caseload. It was reported that, " * * * if prisoner petitions were dropped from federal court statistics the number of civil cases filed in the first six months of fiscal year 1973 would have been 39,533, only 1.1 per cent more than the comparable figure (excluding prisoner petitions) from the last year." 1973 Semi-Annual Report of the Director of the Administrative Office of the United States Courts 20.

One would expect that after a reasonable period the number of state prisoner civil rights suits in the federal system would begin to level off. Nevertheless, recent data indicates that the increases in such actions are progressive and unrelenting. By 1977, (July 1, 1976 to June 30, 1977) the number of these suits had mounted to 7,752, more than doubling in the five year period from 1972, and representing a 3,456 per cent increase over the number of petitions brought in 1966. See 1977 Federal Judicial Workload Statistics, at Table 15, and 33

Arkansas Law Review 91 (1979). In 1977, state prisoner civil rights actions reached 6.5 per cent of all civil suits in the federal District Courts.

In the decade of the 1970's state prisoner civil rights actions increased from 2,030 in 1970 to 11,195 in 1979, a 451.5 per cent increase! *Amicus* noted *supra* that prisoners are increasingly opting for the § 1983 suits as opposed to habeas corpus petitions. While the § 1983 suits increased over 450 per cent, the number of habeas corpus petitions actually decreased from 9,036 in 1970 to 7,133 in 1979, a 21.4 per cent decline. 1979 Annual Report of the Director of the Administrative Office of the United States Courts at 61; *see also* 11 Cumberland Law Review 369 (1980).

Focusing on the former Fifth Circuit, from which the present case comes, the District Courts have shouldered a disproportionate share of the burden of state prisoner civil rights suits. In 1979, the courts of that Circuit had 2,894 § 1983 suits filed by prisoners, representing an increase of 300 such petitions over 1978. See 11 Cumberland Law Review 369, n. 2 (1980).

The most current data shows that the increase in state prisoner § 1983 actions continues in a dramatic fashion in all the District Courts. Data of July 1 to June 30 for the following years illustrates this increase:

1977—7,752
1978—9,730; 25.5% annual increase
1979—11,195; 15.1% annual increase
1980—12,397; 10.7% annual increase
1981—15,639; 26.2% annual increase
1981 Annual Report of the Director, Administrative Office of the United States Courts at Table 21.

As commentators and jurists have noted, the sheer volume of these cases has strained the limited resources of the federal courts. It does so at a time when federal dockets continue to grow at an alarming pace. As pointed out by Chief Justice Burger in his most recent annual year end report on the

judiciary, during the last judicial year Court of Appeals filings grew almost 14% to 26,362 and District Court filings rose 7% to 211,863. Chicago Daily Law Bulletin, December 28, 1981, p.1.

Yet the most disturbing aspect of this invitation to convicted criminals to exploit § 1983 remedies is the almost universal lack of truly meritorious claims. In 1972 (when prisoners' petitions were one-fifth of what they are today) the Freund Committee made the following observation:

> The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone Supreme Court justices.
>
> Administrative Office of U.S. Courts, Federal Judicial Center Report of the Study Group on the Caseload of the Supreme Court (1972) at 13.

During debates on the Ku Klux Klan Act of 1871 (the predecessor to § 1983), Ohio Senator Thurman expressed concern that a federal claim could be made for five cents. See 33 Arkansas Law Review 91, 92 (1979). Thurman was close. Indeed, one hundred years later we find prisoner civil rights actions for seven packs of cigarettes, *Russell* v. *Bodner*, 489 F. 2d 280 (3d Cir. 1973); $3.52, *Weddle* v. *Director, Patuxent Inst.*, 436 F. 2d 342 (4th Cir. 1970), *vacated*, 405 U. S. 1036 (1972); postage worth $2.47, *Brooks* v. *Steele*, No. 78-8296, *petition to appeal in forma pauperis granted, appeal dismissed* (5th Cir. 1978); $68.35, *Diamond* v. *Thompson*, 523 F. 2d 1201 (5th Cir. 1975); an office supply catalog, *Nickens* v. *White*, 536 F. 2d 802 (8th Cir. 1976); $2.46, *Rhodes* v. *Sigler*, 448 F. 2d 1237 (8th Cir. 1971); stereo equipment, *Secret* v. *Brierton*, 584 F. 2d 823 (7th Cir. 1978); and hobby materials, *Parratt* v. *Taylor*, ____ U. S. ____ (1981).

While judicial economy is perhaps the most compelling policy reason to require exhaustion of administrative remedies where those remedies are deemed adequate, numerous other

salient factors strongly suggest the need for imposition of an exhaustion requirement.

The point-of-view most often overlooked in the context of § 1983 suits is the impact upon prison employees. Judge Aldisert, however, has discussed this impact:

> Despite *McNeese, Domico,* and *Wilwording,* there appears to be no rational relationship between federal civil rights actions for personal money judgments against underpaid prison guards, wardens, and deputy wardens and the reluctance of state legislatures to spend the funds needed to clean up horrible conditions in the prisons. The reverse is more likely true. Exposure to a personal money judgment probably causes capable personnel to leave prison administration and discourages able men from entering.
> 1973 Law and Social Order 557 at 565-6.

Judge Aldisert also notes that ready access to the federal courts has crippled prison discipline, demoralized guards and given the prison "toughs" an inordinate degree of authority. *Id.* at 566.

In advocating an exhaustion doctrine, *amicus* respectfully asks that this Court re-examine the fundamental purpose of such a requirement in the administrative arena. The Court has stated, "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi* v. *Davidson,* 405 U. S. 34, at 37 (1972).

It is well established law that there must be an adequate administrative process in place as a condition precedent to an exhaustion requirement. Where there is the possibility of fair administrative relief and adequate procedures, there will be a forum that is knowledgable and capable of hearing prisoners' grievances. There will also be agency expertise. With all due respect for the judges of the federal District Courts, it is not likely that their understanding of state prison conditions can compare to administrative hearing officers who examine these allegations of conditions on a daily basis. The contention that

the federal courts are the only fair fora for relief in § 1983 actions is an affront to those involved in the administrative process and a charade by prisoners to place distance between actual prison conditions and those individuals capable of mandating changes. Many prisoners purposely do not seek fair hearings by those who possess knowledge of the source of the grievance. An exhaustion requirement in this respect would do no more than require such hearings, whereas a failure to require exhaustion of administrative proceedings would make such proceedings nothing more than a shell, with administrative expertise being a wasted resource.

Still another sound and compelling policy reason for an exhaustion requirement is that it will serve to bring a speedy resolution of meritorious claims. We again advance such a proposition under the assumption that an adequate administrative procedure is in place. *Amicus* cannot and will not defend a process that summarily denies an overwhelming percentage of claims. However, it is clear that in a fair setting, grievances with merit will be resolved in the most timely and least expensive method by the exhaustion requirement. We believe that all claims for relief would be dealt with in a speedier fashion, since those with true merit would likely be resolved prior to federal filing and those § 1983 suits filed in the federal courts will be heard more expeditiously because of the effect of the administrative filtering and reduced backlog.

The Civil Rights Act of 1980, codified at 42 U. S. C. § 1997e, represents congressional recognition of the need for a strong administrative role in § 1983 suits brought by prisoners. This law sets forth a plan to develop a certification procedure for state prison grievance resolution. While this legislation addresses the problem discussed in this brief, it will not alone resolve it. There is no requirement in § 1997e to exhaust or even pursue state remedies prior to bringing a § 1983 suit.

In September, 1981, U. S. Representative Bobbi Fiedler of the State of California, introduced H. R. 4427. It would amend § 1983 by adding:

> If the plaintiff in an action, suit or other proceeding under this section seeks relief from the conditions of such plaintiff's imprisonment pursuant to State criminal conviction, no relief shall be granted unless the plaintiff exhausted all State remedies, nor shall relief be granted if the plaintiff received an adverse ruling on the claims being presented in the action, suit or proceeding under this section from a State court in a fair proceeding.

This bill, now pending in Congress, takes the steps necessary to resolve the problem created by § 1983 abuses by prisoners.

Notwithstanding possible congressional action, the exhaustion rule is a creature of the courts. This Court now has the opportunity to act on measures which were originally designed to extend appropriate civil rights protections, but which have more recently resulted in judicial backlogs, denial of speedy and inexpensive resolutions, denial of agency expertise, federal control over state-financed and administered institutions, and a demoralization of prison administration. Requiring exhaustion of state administrative remedies where adequate procedures are available will never result in the denial of meritorious claims of prisoners or others in the federal courts. The benefits to the courts, the prisons, the states and the taxpayers make such a requirement well founded, timely and necessary.

CONCLUSION

Amicus respectfully submits that the decision of the former United States Court of Appeals for the Fifth Circuit should be affirmed on the law and on the basis of sound judicial policy.

Respectfully submitted,

Attorneys for Amicus Curiae:
FRED E. INBAU, ESQ.
Chairman of the Board, Americans for Effective Law Enforcement, Inc.
40 East Oak Street
Chicago, Illinois 60611
WAYNE W. SCHMIDT, ESQ.
Executive Director,
Americans for Effective Law Enforcement, Inc.
501 Grandview Drive
South San Francisco, California 94080
JAMES P. MANAK, ESQ.
General Counsel,
Americans for Effective Law Enforcement, Inc.
33 North LaSalle Street,
Suite 2108
Chicago, Illinois 60602

Of Counsel:
WILLIAM E. HORNSBY, JR., ESQ.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

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BRIEF ON BEHALF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

JACK GREENBERG
JAMES M. NABRIT, III
BILL LANN LEE*
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae

* Counsel of Record

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Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY.

BRIEF ON BEHALF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

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Interest of Amicus

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist black

persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of issues brought pursuant to 42 U.S.C. § 1983. E.g., Monell v. New York City Departmet of Social Services, 436 U.S. 658 (1978); Brown v. Board of Education, 347 U.S. 483 (1954). The Legal Defense Fund believes that its experience in such litigation and the research it has performed will assist the Court in this case. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

Summary of Argument

We respectfully submit that neither the language nor the legislative history of section 1 of the Civil Rights Act of 1871, presently codified as 42 U.S.C. § 1983, impose any requirement of exhaustion of administrative remedies. The legislative history reveals that Congress intended no such restriction on the broad right to bring section 1983 actions. Nor can any such restriction be implied in light of the fact that any notion of a judicially imposed exhaustion requirement did not emerge until much later, in the twentieth century. Indeed, any exhaustion requirement would be inconsistent with one of the critical findings of the forty-second Congress that state officials were unwilling to enforce constitutional guarantees.

This is not to say that potential plaintiffs must or will inevitably sue under section 1983. Rather, Congress has provided an incentive for improvement of administrative and other remedies in the states by continuing to make section 1983 a ready remedy while permitting those aggrieved to utilize any state remedies which they believe to be efficacious.

ARGUMENT

Whether as a matter of policy it would be wise to require, as a precondition of access to federal courts, that persons alleging violations of their constitutional rights, first exhaust any available state administrative remedies, is a complex, sensitive, and important question. The court of appeals below viewed this case as an appropriate vehicle to express its views

regarding federal-state relations, the ideal allocation of judicial resources, and the best manner in which the federal courts can encourage the states to strengthen their administrative procedures. We believe that the Fifth Circuit misconceived the nature of the issue before it, and the role of the federal courts in resolving it.

The question presented by this case is not one of judicial philosophy, but of statutory construction. The responsibility of the courts is limited to ascertaining the intention of the Congress which met some 110 years ago and fashioned the 1871 Civil Rights Act. Those legislators lived in a time very different from our own. Half the country, still prostrate from an exhausting war, wavered between mob rule and total anarchy; the Klu Klux Klan,

today little more than a deplorable relic of past hatreds, then functioned as virtually a shadow government in many southern states. Far from being concerned about offending the sensitivities of "sovereign states," the forty-second Congress presided over a military occupation of those former Confederate States, whose leaders it often labeled as traitors. Whether the 1871 Civil Rights Act was wisely drafted when adopted, or ought to be amended in light of changing conditions, are not questions this Court need or should address. The sole issue before this Court is whether the framers of that Act intended that its remedies only be available to those who had first exhausted state administrative remedies.

I. THE LANGUAGE OF SECTION 1983

Because the question of exhaustion is one of statutory construction, the language of the statute itself is of central importance. By its terms section 1983 creates a species of tort liability that admits of no preconditions or prerequisites. See Imbler v. Pachtman, 424 U.S. 409, 417 (1976). Its language is absolute and unqualified; no mention is made of state or federal administrative remedies, of state judicial proceedings, or of any other event which must occur between the constitutional violation and the commencement of the authorized civil action. See Owen v. City of Independence, 445 U.S. 622, 635 (1980). Rather, the act imposes liability on "[e]very person" who under color of law subjects "any person" to a "deprivation of any rights, privileges, or immunities

secured by the Constitution and laws." Nothing on the face of the statute suggests that only persons who have exhausted state remedies, rather than "any person" whatsoever, can avail themselves of the protection of the statute.

The existence of an exhaustion requirement is inconsistent with the type of defendants subject to suit in a section 1983 action. Most of the cases imposing exhaustion requirements involved litigation against government agencies seeking remedial orders aimed at those agencies themselves. But section 1983 is not so directed. It authorizes suit not just or primarily against government bodies, but against any "person" who has violated federal rights under color of state law. States can never be named as defendants,[1/] and local govern-

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1/ Quern v. Jordan, 440 U.S. 332 (1979).

ments can only be sued under certain narrowly defined circumstances.[2/] Natural persons are the most common, and frequently the only defendants in section 1983 cases.

Exhaustion is a rule about when a party suing a state or federal agency must utilize remedies provided by that defendant agency to correct its own errors. An exhaustion requirement could intelligibly, although mistakenly in our view, be applied in a police brutality suit against a city. But if such a suit, as Congress clearly contemplated most section 1983 suits would be, were against an individual police officer, exhaustion is an anomalous concept. The actual defendant policeman simply has no "administrative remedies" to

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2/ Monell v. New York City Department of Social Services, 436 U.S. 658, 690-695 (1978).

offer. The City is not a named defendant, and if, as alleged, the conduct complained of is unconstitutional, the conduct is "without the authority of, and does not affect the [city] in its sovereign or governmental capacity." Ex parte Young, 209 U.S. 123, 159 (1908). A city or state, of course, may choose to create an administrative remedy for injuries caused by its employees acting in excess of their authority, just as it may provide assistance for victims of harms committed by private wrongdoers, such as compensation for victims of crimes. The perpetrator of such a private crime could not conceivably immunize himself from suit by demanding that his victim "exhaust" such third party remedies. The position of a wrongdoer who happens to be a public official is not significantly different. It is unlike-

ly in the extreme that Congress intended, where a suit was brought against both a city and its officials, that the action could proceed against the official but would have to be stayed pending exhaustion as to the city itself. It is only marginally less unlikely that Congress intended to impose an exhaustion requirement in the minority of cases in which only a government agency was named as a defendant.

The debates leading to the passage of section 1 of the Civil Rights Act of 1871, the forerunner of section 1983, support a literal reading of this broad and unrestricted language. Representative Shellabarger, the author and manager of the bill in the House, explained how the courts should interpret the Act:

> This Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing

> such statutes are liberally and beneficently construed.
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> . . . . As has been again and again decided by our own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. 3/

See also Monell v. New York City Department of Social Services, 436 U.S. 658, 683-87 (1978).

The adoption of an exhaustion requirement, for whatever reasons, would necessarily establish a barrier, sometimes temporary, on occasion perhaps permanent, to relief in the federal courts. At the least an aggrieved party would find that, until exhaustion was completed, the national courts were closed to him; if all state

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3/ Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871).

remedies were not sought, access to the federal courts might be precluded forever. Nothing could have been further from the contemplation of the framers of the 1871 Act. Representative Lowe insisted that the Act "throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired."[4/] Congressman Coburn urged:

> Obviously the court of justice is the first instrument to be used in aid of the fourteenth amendment; safer, milder, surer, more in accordance with reason, with our system, and with public sentiment. Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ... Here may come the weak and poor and downtrodden with assurance that they shall be heard. [5/]

Even those who opposed other aspects of the

[4/] Cong. Globe, 42nd Cong., 1st Sess. 376.

[5/] Id. 459.

Act agreed that the federal courts should be available whenever a constitutional violation were threatened. If a state passed laws contravening the Fourteenth Amendment, Representative Slater emphasized,

> Such laws would be simple nullities ... and every officer of the state, from a justice of the peace to the supreme judge, from a constable to the Executive, under their oath to support the Constitution of the United States, would be bound to disregard them. If, however, their enforcement were attempted, the citizen is not without means of protection. The Federal courts, always open with writs of habeas corpus, writs of restraint, and injunctions, and other remedial agencies, can at all times render efficient and ample security against actual or threatened disregard of these guarantees. 6/

That the doors of the federal courts should now be closed to petitioner, as the courts below urged, would be squarely contrary to the original intent of Congress.

6/ Id. App. 305 (emphasis added).

II. THE ORIGINS OF THE JUDICIAL REQUIREMENT OF ADMINISTRATIVE EXHAUSTION

The broad language of section 1983, combined with the expansive construction of it clearly contemplated by its framers, would ordinarily be sufficient to defeat any claim that relief against a particular party could be delayed or denied. This Court has only recognized as limitations to section 1983 actions rules "so firmly rooted in the common law ... that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" Owens v. City of Independence, 445 U.S. 662 (1980). Thus in Tenney v. Brandhove, 341 U.S. 367 (1951), this Court concluded that legislative immunity was in 1871 such a long established doctrine, noting that it had been at the center of the Parliamentary struggles of the sixteenth and seventeenth

centuries, and was expressly incorporated in the English Bill of Rights, the Articles of Confederation, the Constitution, and at least eight 18th century state constitutions or bills of rights. 341 U.S. 372-75.

In Monell both the majority and the dissenters agreed that the state of the law in 1871 regarding municipal immunity was of controlling importance in determining whether cities could be sued under section 1983. The majority rejected any absolute municipal immunity because "by 1871, ... municipal corporations were routinely sued in the federal courts and this fact was well known to the Members of Congress," 436 U.S. at 588. Justice Rehnquist argued, to the contrary, that at that time "no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons."

436 U.S. at 721. Similarly, in Owens v. City of Independence, 445 U.S. 622 (1980), all members of the Court regarded this historical issue as critical. The majority concluded that the broad language of the statute could not be restricted by good faith immunity for local governments because in the nineteenth century "the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful." 445 U.S. at 641. Justice Powell and three other members of the Court dissented on the ground that the majority opinion "runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions." 445 U.S. at 676.

If the right of petitioner in this case to maintain an action in federal court

is to be delayed or denied, despite the literal language of section 1983, it must be because the principle of a judicially imposed administrative exhaustion rule was so firmly established in 1871 that Congress was well aware of it, knew that the courts would apply it unless otherwise directed, and would have expressly disapproved of that judicial practice had it not wanted it applied. Fortunately here, unlike Monell and Owens, the issue is clear beyond peradventure. This exhaustion doctrine was totally unheard of in 1871.

Scholars generally agree that the idea of a judicially imposed administrative exhaustion requirement has its roots in Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).[7/] In that case the rail-

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7/ Comment, Exhaustion of Administrative Remedies, 39 Cornell L. Q. 273, 277 (1939)

road challenging certain proposed rates as confiscatory had failed to appeal them to the Virginia Supreme Court of Appeals, which reviewed such rates in a legislative capacity. Mr. Justice Holmes, emphasizing that "[n]o new evidence and no great additional expense" would be involved, held that the railroad had sued too soon, and

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("Prentis v. Atlantic Coast Line Co., is the real beginning of the exhaustion rule."); Lilienthal, The Federal Courts and State Regulation of Public Utilities, 43 Harv. L. Rev. 379, 385 (1930) ("The doctrine had its beginning in Prentis v. Atlantic Coast Line Co.,"); Note, 51 Harv. L. Rev. 1251, 1261 (1938)("This principle was established in the case of Prentis v. Atlantic Coast Line Co."). Alpert, Suits Against Administrative Agencies under N.I. R.A. and A.A.A., 12 N.Y.U.L.Q. Rev. 393, 395 (1935). Professor Berger argues that the doctrine originated in this Court in a decision four years before Prentis, United States v. Sing Tuck, 194 U.S. 161 (1904). R. Berger, Exhaustion of Administrative Remedies, 48 Yale L. J. 981, 981-82 (1938).

directed it to pursue that appeal. 211 U.S. at 230. But the Court did not pretend it was applying any hitherto heard of rule. The majority opinion repeatedly disavowed any attempt to formulate a "general rule" or "general principles," 211 U.S. at 229; it cited no authority for its decision, and indicated that the defendant had not raised the argument on which the decision was based. Id.

The possibility that exhaustion was a requirement of general application emerged only slowly. The early attempts to invoke Prentis as a defense sought to require exhaustion of judicial remedies, and were soundly rejected.[8/] In 1921 the Supreme Court unanimously reversed a court of

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8/ Prendergast v. New York Telephone Co., 262 U.S. 43, 48 (1923); Bacon v. Rutland Railroad Co., 232 U.S 134, 137 (1914).

appeals decision that a consumer aggrieved by federal agency action increasing utility rates had to file a formal complaint and seek a modification of that decision.[9/] In Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123-24 (1926), the Court held that the plaintiff could not complain of action taken by the Board until he had sought a hearing before it on the dispute in question, but this was an argument the defendant itself had never made.[10/] Not until 1929 do this Court's decisions refer to a "doctrine" approved in Prentis.[11/] The term "exhaust" appears

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9/ Hollis v. Kutz, 255 U.S. 452, 453-54 (1921).

10/ Brief on Behalf of Defendant in Error, No. 320, October Term 1925, pp. 3, 23.

11/ Gilchrist v. Interborough Rapid Transit Co., 279 U.S 159, 208 (1929).

only intermittently in those early years.[12/] Only in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938), some 57 years after the enactment of section 1983, is the existence of a judicially imposed exhaustion requirement sufficiently clear that any inference about Congressional intent could even arguably be drawn from Congressional silence.

The absence of any judicial exhaustion requirement until long after the enactment of section 1983 is particularly important because the 42nd Congress was well aware of the volume of litigation in the federal courts against local governments. Monell v. New York City Department of Social Ser-

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12/ Porter v. Investors Syndicate, 286 U.S 461, 468 (1932); First National Bank of Greeley v. Board of County Commissioners of County of Weld, 264 U.S 450, 453 (1924).

vices, 436 U.S. 658, 673, n.28 (1978); Owen v. City of Independence, 445 U.S. 622, 642-43 (1980). Only where federal law expressly required exhaustion as a precondition of suit did the courts impose such a requirement. Nicholl v. United States, 7 Wall. (74 U.S.) 122, 130-31 (1869).

Whenever during the 19th century Congress wished to impose an exhaustion requirement, it did so expressly and unequivocally. In 1857 Congress authorized importers who paid duties under protest to sue for a refund provided they first appealed to the Collector of Customs.[13/] In

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13/ "On the entry of any goods, wares and merchandise imported on and after the first day of July aforesaid, the decision of the collector of the customs at the port of importation and entry, as to their liability to duty or exemption thereform shall be final and conclusive against the owner, importer, consignee, or agent of any such goods, wares, and merchan-

1866 Congress gave aggrieved taxpayers the right to sue the Commissioner of Internal Revenue for taxes erroneously or illegally assessed, but only if an "appeal shall have been duly made to the commissioner."[14/]

13/ continued

> dise; unless the owner, importer, consignee or agent shall, within ten days after such entry, give notice to the collector, in writing of his dissatisfaction with such decision, setting forth therein distinctly and specifically his grounds of objection hereto, and shall, within thirty days after the date of such decision, appeal therefrom to the secretary of the treasury, whose decision on such appeal shall be final and conclusive; and the said goods, wares and merchandise shall be liable to duty or exempted therefrom accordingly, any act of Congress to the contrary notwithstanding; unless suit shall be brought within thirty days after such decision for any duties that may have been paid, or may thereafter be paid, on said goods, or within thirty days after the duties shall have been paid in cases where such goods shall be in bond." 11 Stat. 195.

14/ "No suit shall be maintained in any court for the recovery of any tax

The forty-second Congress, which framed section 1983, also gave merchant seamen a cause of action for a penalty of up to one hundred dollars against any ships master who failed to provide adequate water and provisions, but the penalty could not be sought until the seamen had complained to a navy officer or an American consular offi-

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14/ continued

alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue, according to the provisions of law in that regard, and the regulations of the secretary of the treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: Provided, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal." 14 Stat. 152.

cial. 17 Stat. 269. No such exhaustion requirement, on the other hand was imposed as a precondition of suits in the Court of Claims.[15/] This legislation makes clear that the Congress which enacted the 1871 Civil Rights Act knew how to write an exhaustion requirement into a statute and did so whenever it wanted to require the utilization of administrative remedies prior to suit. Its refusal to place such a requirement into section 1983 can only be understood as a deliberate decision not to impose any such requirement on those seeking relief against state officials violating federal rights.

Had Congress intended to impose any exhaustion requirement, it is far more likely that it would have been concerned

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15/ 10 Stat. 612.

with exhaustion of state judicial remedies than state administrative remedies. The violations of federal rights about which Congress was concerned, particularly violence directed at blacks, federal officials and union sympathizers, were, then as now, redressed by judicial action. In the nineteenth century administrative remedies were so untried and even uncommon that it is far more probable that Congress would have expected any redress to come from the courts. The state courts were at least marginally more likely to be independent of local politics and passions than would elected officials dependent on popular support for continuation in office. Although state judges might be obligated by the Supremacy Clause to enforce the Constitution, the constitutional doctrine which reigned in 1871 was that the federal government could not impose on state

executive officials any obligations to implement federal law. Monell v. New York City Department of Social Services, 436 U.S. 658, 676-79 (1978) (discussing Prigg v. Pennslyvania, 16 Pet. 539 (1842), and Kentucky v. Dennison, 24 How. 66 (1861)).

The legislative history of section 1983, however, makes clear that judicial exhaustion was not to be required. The opponents of the 1871 Act well understood that it contained no requirement of judicial exhaustion, and objected to it on precisely that ground. Representative Storm complained that section 1

> does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.
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> Now these questions could all be tried, I take it, in the State courts, and by a writ of error ... could be

> brought before the Supreme Court for review.... But the first section does not allow that right. It takes the whole question away at once and forever ... 16/

Senator Thurman opposed that section

> because of the centralizing tendency of transferring all mere private suits, as well as punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understoood. It leaves it, I presume, in the option to the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been least injured, but who has some malice to gratify, will be the most likely to avail himself of. 17/

The inclusion of this objection in Thurman's "parade of horribles" is precisely the sort of evidence as to the meaning of the act which Mr. Justice Rehnquist

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16/ Cong. Globe, 42nd Cong., 1st Sess. App. 86.

17/ Id. App. 216.

thought critical in Monell v. New York City Department of Social Services, 436 U.S. 658, 722 (1978).

III. THE PURPOSE OF EXHAUSTION AND THE LEGISLATIVE HISTORY OF SECTION 1983

Although the justifications offered for the exhaustion rule are numerous, many are obviously inapplicable here. The most common application of the exhaustion requirement is where a plaintiff seeks review by the courts of action by a federal agency charged by statute with implementing the statute on which the plaintiff relies. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). The considerations of expertise and statutory responsibility relevant to such a case clearly have no place here. The 1871 Civil Rights Act did not establish any state agencies to enforce the Constitution; neither did it direct or authorize state

officials to provide any administrative or judicial remedies for constitutional violations. Nothing in the language of the statute contemplates that the states are to play any role in redressing violations of the Constitution.

If exhaustion is to be required it must be for reasons other than implementing or respecting a congressionally established administrative scheme. Exhaustion in a case such as this could plausibly be urged to serve one of two purposes. First, if an aggrieved party were to obtain in the state administrative proceeding the relief that would otherwise be sought in federal court, the work of those courts would be reduced. Second, if the victim's injuries are redressed by the state itself, some potential for federal-state conflict might be avoided. We do not suggest that either of these justifications are persuasive, but

only that it must be on a basis such as this that exhaustion is grounded. See McKart v. United States, 395 U.S. 185, 193-95 (1969).

All the justifications that might be advanced in this or any other case for requiring administrative exhaustion rest on one absolutely essential assumption -- that the agency whose procedures must be pursued will make a serious and good faith effort to consider the plaintiff's claims and to implement the same rules that the plaintiff seeks to enforce in court. Absent that assumption, there is no reason whatever to believe that any of the purposes of exhaustion will be served. If the agency is not acting in good faith, no possible relief can come of the agency proceedings, and the federal courts in ultimately granting relief will have to disapprove of the agency proceeding as well as the initial

violation. More seriously, an agency proceeding in bad faith could manipulate an exhaustion requirement to severely aggravate the violation that has already occurred. Rather than "building a record," the proceeding could be used as an opportunity to conduct pre-trial discovery and then reshape the agency's defense. The resolution of the underlying claim could be delayed in the hope of exhausting the plaintiff's resources or his or her patience.

We do not contend that this crucial assumption of agency good faith and minimal competence is mistaken as to all state agencies, or unjustified on the facts of this particular case. Rather, we urge that this assumption is totally inconsistent with the findings and conclusions which led Congress to adopt the 1871 Civil Rights Act. The forty-second Congress, we contend, believed that state officials were certainly

unable, and in most cases unwilling, to comply with or enforce the United States Constitution. In light of that finding, which lies at the heart of the 1871 Act, we submit that Congress cannot conceivably have intended to require aggrieved parties, prior to obtaining access to federal courts, to seek redress from the very state officials whom Congress concluded would deny it.

One critical purpose of the 1871 Act was "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." Monroe v. Pape, 365 U.S 167, 174 (1961). Congressman Stoughton asserted

> The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst Government on the face of the earth respectable by way of comparison. There is no security for life, person or property. The State authorities and local courts are un-

> able or unwilling to check the evil or punish the criminals. 18/

Representative Perry exclaimed:

> Where these gangs of assassins show themselves, the rest of the people look on, if not with sympathy, at least with forebearance. The boasted courage of the South is not courage in their presence. Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal for justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished. 19/

Senator Pool argued that the state "courts have been tried, and the executive arm has

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18/ Cong. Globe, 42nd Cong., 1st Sess. 321.

19/ Id. App. 78.

been tried, and both have failed."[20/]

Representative Snyder noted that

> multiplied hundreds of loyal people, both male and female, have been whipped, scourged, lacerated, exiled, robbed, and murdered, by these demonish Klans. ... Anarchy and violence are supreme and the adherents of the Government are utterly unprotected. They appeal in vain to State authority, and are now before us as humble suppliants for federal protection. [21/]

Senator Morton argued

> But it is said these crimes should be punished by the States; that they are already offenses against the laws of the States, and the matter should be left with the States. The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs. The great fact remains that large classes of people, numbering nearly one half in some States, are without legal remedy in the courts of the States. Should this fact be overlooked for the sake of a theory? Shall it be said with any reason that

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20/ Id. App. 170.

21/ Id. App. 199.

> it is proper to leave the punishment of these crimes to the States when it is a notorious fact that the States do not punish them. 22/

Senator Osborn explained:

> If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves, i.e., the full and complete administration of justice in the courts. 23/

Congresman Rainey remarked:

> The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit could result from an appeal to tribunals

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22/ Id. App. 252.

23/ Id. at 653.

> whose officers are secretly in sympathy with the very evil against which we are striving. 24/

Senator Pratt urged:

> [O]f the hundreds of outrages committed upon loyal people through the agency of this Klu Klux Klan organization, [but] not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples. 25/

Congressman Lowe argued

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of

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24/ Id. at 394.

25/ Id. at 505.

> the public tribunals are searched in vain for any evidence of effective redress.26/

Mr. Beatty asserted:

> [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent.27/

Recognizing that the forty-second Congress believed that remedies nominally available on the face of state laws were not available in practice, Justice Rehnquist urged in City of Columbus v. Leonard 443 U.S. 905 (1979) (Rehnquist, J., dissenting from denial of certiorari) that exhaustion might nonetheless be required where a state could demonstrate in fact "that there is an available and adequate remedy." The

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26/ Id. at 374.

27/ Id. at 428.

practice suggested by Justice Rehnquist is far different from any requirement hitherto imposed by the federal courts, and would defeat rather than advance the purposes behind exhaustion.

To put itself outside the category of cases about which Congress was concerned, a state would have to prove more than that some administrative procedure existed in which the relief sought in federal court was technically available. A state would have to demonstrate by clear and convincing evidence that such relief was <u>in fact</u> provided by that process to persons such as the plaintiff. The resolution of such claims would necessarily defeat the very purposes of exhaustion. Far from reducing the workload of the federal courts, this novel approach would force federal judges to preside over often

lengthy trials regarding the entire case-load and history of the agency, weighing the frequency and type of relief awarded, ascertaining whether relief was equally available in all relevant types of cases, and searching for meritorious claims that might have been wrongfully denied. Often such hearings would be more time consuming and complex than the actual trial on the merits. In addition, rather than deferring to state authorities on the assumption that they would act competently and in good faith, the federal courts would be required to sit in judgment on the actual abilities and character of the state officials involved, a process virtually certain to aggravate federal-state relations. This entire process, moreover, would be an attempt by the state to prove that, however justified the Congress might have been in

enacting the 1871 Civil Rights Act, its underlying findings were erroneous as applied to the administrative agency. The federal courts do not ordinarily sit to reconsider the wisdom or accuracy of congressional findings.

We recognize that circumstances in the South have changed greatly since the enactment of the 1871 Civil Rights Act. Some administrative remedies now in existence are fair or efficient or both; others, regrettably, are neither. But Congress gave the federal courts no mandate to conduct trials on the efficacy and biases of each of the thousands of state agencies that abound today, and no authority to pick and chose when section 1983 would afford its protections.

Rather, Congress provided for the possibility of improvement in the conditions which it found in 1871 by permitting

aggrieved parties to utilize any state remedies, administrative, judicial or legislative, which they believed to be efficacious. Such individual decisions, by people who will often understand the realities of the agencies far better than a federal judge, impose none of the burdens on federal courts or difficulites for federal-state relations inherent in Justice Rehnquist's proposal. This statutory system provides state agencies anxious for an opportunity to resolve disputes internally with a powerful incentive to make genuine administrative relief available in practice in order to persuade aggrieved parties to seek redress there rather than in federal court. Regardless of whether this Court might today choose a different approach, this is the scheme enacted by Congress when it adopted the 1871 Civil

Rights Act, and it is the scheme which the federal courts must adhere to until and unless Congress directs otherwise.

IV. THE DEBATES CONCERNING THE SHERMAN AMENDMENT

In this case, as in Monroe, Monell and Owen, considerable light is thrown on the intent of Congress by the controversy surrounding the Sherman Amendment. The first conference report on the 1871 Civil Rights Act contained a provision drafted by Senator Sherman which imposed on a city or county strict liability for any injuries caused by a riot within its borders. This proposal was rejected by the House on a variety of grounds. Monell v. New York City Department of Social Services, 436 U.S at 669-683. Congress then adopted language, now codified as 42 U.S.C. § 1986, imposing liability on any person who had

knowledge of a conspiracy to violate the victim's civil rights and failed to use his or her power to prevent it.[28/]

28/ In rejecting the application of the doctrine of respondeat superior to impose on cities or counties strict liability for constitutional violations committed by their officials, Monell relied heavily on the history of the Sherman Amendment. 436 U.S. at 693-94. Monell reasoned that the debates on that amendment provided a critical insight into Congress' views as to the circumstances under which liability should be imposed on a defendant.

One aspect of the Sherman amendment debates relied on by Monell was opposition to the amendment on the ground that it imposed liability on a local government even if it "did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it." 436 U.S at 692, n.57. Senator Stevenson argued the amendment "undertakes to create a corporate liability for personal injury which no prudence or foresight could have presented." Cong. Globe, 42nd Cong., 1st Sess. 762. Representative Kerr objected,

> There is ... a total and absolute absence of notice, constructive or implied, within any decent limits of law or reason. ... Under this

The language adopted in place of the Sherman amendment, and now contained in section 1986, represents the view of Congress as to the amount of knowledge and degree of action or inaction appropriate for the imposition of the liability by the fedral courts. The substitute amendment provided:

> [A]ny person or persons having knowledge of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed; such person or persons shall be liable to the person injured, or his legal representatives. Id. at 804.

28/ continued

> section it is not required, before liability attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality. Id. at 788.

See also id. at 791 (Rep. Willard.)

The form of knowledge called for was knowledge prior to the alleged violation that the act subsequently complained of was to occur; the action required was failure to prevent that harm. This combination of foreknowledge and lack of prevention represents a carefully framed balance of the competing considerations urged in the congressional debates. These prerequisites to liability were not only the minimum conservatives would accept as a precondition to suit, but the most the supporters of Reconstruction would concede.

The imposition of an exhaustion requirement would alter this balance in substantial manner clearly not contemplated by Congress. First, in addition to knowing that a violation was about to occur, a city would have to be notified <u>after</u> the violation that the victim wanted redress. Second, over and above having failed to

prevent the violation, the city would have to fail as well to provide a subsequent remedy. During the debates on the Sherman amendment Senator Thurman actually advocated just such an exhaustion requirmeent, urging that plaintiffs be required to give cities a written notice of claim within 7 days of the commission of the offense, citing a statute with such a provision enacted under George IV. Id. at 770. This proposal found no support in Congress, however, and was not included in the language ultimately adopted.

If Congress did not contemplate any exhaustion requirement under section 1986, a fortiori, it cannot have intended one under section 1983. Unlike a section 1986 defendant, who is liable merely for failing to prevent harm to the victim, a section 1983 defendant must actually commit

or cause the violation itself. Monell, 436 U.S. at 692. Thus a section 1983 defendant by definition knows more and does more than a section 1986 defendant. And, since the 1983 defendant is the active evildoer, not merely a neglectful bystander, it is far less likely that an appeal for redress would succeed to the former than to the latter. If a city failed to prevent a known conspiracy of police officers from violating a victim's constitutional rights, exhaustion would not be a precondition of a section 1986 suit against the city; Congress cannot have intended to impose such a requirement on a section 1983 suit against the policemen themselves.

CONCLUSION

For the above reasons the judgment of the court of appeals should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
BILL LANN LEE*/
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae

*/ Counsel of Record

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No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, a body corporate, for and on behalf of FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE*

RICHARD C. DINKELSPIEL
MAXIMILIAN W. KEMPNER
Co-Chairmen
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
Attorneys
Lawyers' Committee for Civil Rights Under Law
733 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 628-6700

MICHAEL H. GOTTESMAN *
ROBERT M. WEINBERG
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
DAVID RUBIN
National Education Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 833-4451

Attorneys for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE* [1]

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, virtually all of whom are employed by public educational institutions. One of NEA's purposes is to safe-

[1] The parties have consented to the filing of this brief.

guard the constitutional rights of teachers and other public educators.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee has over the past eighteen years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

Amici have a vital interest in the availability of prompt and complete relief in federal courts for those who are injured by the unconstitutional actions of public officials and entities. In pursuit of that interest, these *amici* have filed joint briefs in this Court in prior cases involving issues affecting the scope of 42 U.S.C. § 1983, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, *Owen v. City of Independence*, 445 U.S. 622. The issue in the instant case—whether state administrative remedies must be exhausted before instituting a § 1983 action—is another that will profoundly affect the availability of prompt relief under § 1983. Accordingly, *amici* have a vital interest in its sound resolution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether, in an action brought pursuant to 42 U.S.C. § 1983, a district court may decline to hear a plaintiff's constitutional claim on the ground that the plaintiff did not exhaust administrative remedies provided by the state. For two reasons, we believe that the answer must be "no".

First, the outcome of this case should be governed by the doctrine of *stare decisis*. In a series of decisions spanning two decades, this Court has construed § 1983

as not containing any requirement that state remedies be exhausted, and, indeed, has decided other issues as to the application of § 1983 from the predicate that such exhaustion is never required. Congress, fully informed of these decisions, has chosen to legislate selectively—creating a carefully limited exhaustion requirement in one category of cases that it believed presented a special need for exhaustion, but otherwise refraining from overruling the no-exhaustion holdings of this Court. In the light of this congressional response, the question whether exhaustion may be required under § 1983 beyond the scope of Congress' recent dictates must be regarded as settled in the negative.

Second, even if the question were to be reexamined by this Court free of the restraint of *stare decisis*, the result would be the same. The question then would be one of statutory construction: whether the Congress that enacted § 1983 *intended* that victims of constitutional violations would have to exhaust state administrative remedies before invoking the protection of the federal courts. Section 1983 does not by its terms create an exhaustion requirement, and there is nothing in the legislative history from which such an intention could be inferred. Nor was a "tradition" of requiring exhaustion so well rooted in the law as of 1871 that Congress could be expected to have specifically so provided had it wished that tradition not to be applicable to § 1983. On the contrary, the "tradition" as of 1871—announced in contemporaneous Supreme Court decisions—was that exhaustion of administrative remedies was not required as a prerequisite to suit under a federal statute unless the statute expressly called for such exhaustion.

ARGUMENT

I. THE DOCTRINE OF *STARE DECISIS* SHOULD PRECLUDE REEXAMINATION OF THIS COURT'S CONSISTENT HOLDINGS THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES IS NOT A PREREQUISITE TO SUIT UNDER 42 U.S.C. § 1983.

A.

This Court first confronted the question whether state remedies must be exhausted before suing under § 1983 in *Monroe v. Pape*, 365 U.S. 167. Recognizing the question to be one of statutory construction, the Court surveyed in detail the relevant legislative history (*id.* at 172-183) and concluded as follows (*id.* at 183):

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

The state remedy involved in *Monroe* was judicial rather than administrative. But shortly thereafter in *McNeese v. Board of Education*, 373 U.S. 668, the Court held that the *Monroe* analysis was equally applicable to state *administrative* remedies. The Court stated that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy," and that the statutory purpose was "to provide a remedy in the federal courts supplementary to *any* remedy any state might have." *Id.* at 672 (emphasis added).

In *McNeese* the Court went on to observe that the state remedy at issue in that case may have been inadequate in any event (*id.* at 674-675), but the Court soon made clear that the holding in *McNeese* had not turned on the possible inadequacy of the state administrative remedy, and that exhaustion is not required irrespective of the "adequacy" of state administrative remedies, *Damico v. California*, 389 U.S. 416:

> The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court that all of the plaintiffs [had] failed to exhaust *adequate* administrative remedies.' This was error. In *McNeese* . . ., noting that one of the purposes underlying the Civil Rights Act was 'to provide a remedy in the federal courts supplementary to any remedy any State might have' . . ., we held that 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an *adequate*] remedy' . . . See *Monroe v. Pape* . . . [*Id.* at 416-417 (brackets in original) (emphasis added).] [2]

The holding of *Damico*—that exhaustion of state administrative remedies is never required under § 1983—has been reaffirmed by the Court on numerous occasions. In *Wilwording v. Swenson*, 404 U.S. 249, as well as in *Houghton v. Shafer*, 392 U.S. 639, "[a]lthough the probable futility of [the] administrative appeals [available in those cases] was noted, [the Court] held that in 'any event, resort to these remedies is unnecessary.'" *Wilwording, supra*, 404 U.S. at 252. Similarly, in *Ellis v. Dyson*, 421 U.S. 426, 432-433, the Court declared: "[e]xhaustion of state judicial or administrative remedies . . . [is] not . . . necessary, for we have long held that an action under § 1983 is free of that requirement." See also *Carter v. Stanton*, 405 U.S. 669; *Allee v. Medrano*, 416 U.S. 802, 814; *Preiser v. Rodriguez*, 411 U.S. 475, 477, 492-493 n. 10, 494; *King v. Smith*, 392 U.S. 309, 312 n. 4.[3]

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[2] Justice Harlan dissented in *Damico* precisely because he disagreed with the Court's holding "that there can be no requirement that a person dealing with an administrative agency . . . [must exhaust his administrative remedy], *no matter how adequate* his remedy [may be]." *Id.* at 418 n. (Harlan, J., dissenting) (emphasis added).

[3] Even those members of the Court who, over the years, have expressed doubts as to whether the cases in question were rightly decided have acknowledged that the cases do indeed establish the

Indeed, so well-settled is the principle that there is no exhaustion requirement under § 1983 that this Court has decided four cases involving *other* issues concerning the

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proposition just stated. See *Damico, supra*, 389 U.S. at 418 n. (Harlan, J., dissenting); *Runyon v. McCrary*, 427 U.S. 160, 186 n. (Powell, J., concurring); *Parratt v. Taylor*, —— U.S. ——, 49 L.W. 4509, 4516 n. 13 (Powell, J., concurring in the result) (suggesting legislative action); *City of Columbus v. Leonard*, 443 U.S. 905 (Rehnquist, J., dissenting from denial of certiorari).

The court below thought that the clarity of this Court's repeated no-exhaustion rulings was clouded by *Gibson v. Berryhill*, 411 U.S. 564, and *Huffman v. Pursue, Ltd.*, 420 U.S. 592. The court below was mistaken.

In *Gibson*, a plaintiff obtained a judgment in a § 1983 action enjoining a state licensing board from conducting a hearing that had been scheduled by the Board. *Id.* at 569-570. In those circumstances the Court, after first noting that it "has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983," added: "[w]hether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide." *Id.* at 574-575. That narrow question is not presented here, for petitioner claims already to have suffered a deprivation, and no state administrative proceeding is pending. Moreover, even were the exception discussed in *Gibson* to be recognized, this Court's subsequent decisions in *Delaware State College v. Ricks*, 449 U.S. 250, and *Chardon v. Fernandez*, —— U.S. ——, 50 L.W. 3341, discussed *infra*, p. 8, make clear that it could not be extended to cases in which a decision to deprive has been made albeit that decision is subject to review before any actual deprivation is to be suffered.

In *Huffman*, the Court created no exhaustion requirement for instituting § 1983 actions; rather, the Court there held only that the doctrine of *Younger v. Harris*, 401 U.S. 37, precludes the issuance of *an injunction against* "a state judicial proceeding as to which the losing party has not exhausted his state appellate remedies," 420 U.S. at 609. As the Court later emphasized in *Wooley v. Maynard*, 430 U.S. 705, 710-711, *Huffman* has no application outside the *Younger* context (i.e. in the absence of *pending* state court proceedings whose interruption is the object of the § 1983 action). *Younger*, of course, has no application to the instant case. As the Court observed earlier this Term, the *Younger* doctrine has been

application of § 1983 from the starting-point that § 1983 contains no exhaustion requirement, and has reached results that might not have been reached but for that predicate. In *Steffel v. Thompson*, 415 U.S. 452, this Court held that the principles of *Younger v. Harris*, 401 U.S. 37 and *Samuels v. Mackell*, 401 U.S. 66, are inapplicable to suits for declaratory relief where criminal prosecution is threatened but not yet instituted, explaining:

> When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. *See, e.g., McNeese v. Board of Education*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961). But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution has been commmenced. [415 U.S. at 472-473].

In *Board of Regents v. Tomanio*, 446 U.S. 478, the Court held that the applicable statute of limitations for a suit under § 1983 is not tolled during the pendency of state proceedings invoked by the plaintiff. The Court reasoned that the statute of limitations governing a federal remedy should not be tolled during the pendency of state proceedings "unless that remedy is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had . . . ," *id.* at 490; and the Court recognized that § 1983 is not so structured: "[T]he District Court's conclusion that state remedies should be utilized before resort to the federal courts . . . does not square

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limited in [its] application to federal cases which seek to enjoin state judicial proceedings." *Fair Assessment in Real Estate Association, Inc. v. McNary*, —— U.S. ——, 50 L.W. 4017, 4020. The plaintiff in the instant case does not seek to enjoin *any* state proceedings, let alone state *judicial* proceedings.

with what must be presumed to be congressional intent in creating an independent federal remedy." *Ibid.*

In *Delaware State College v. Ricks*, 449 U.S. 250, the Court ruled that the time limit for filing a § *1981* action challenging an employment decision as unconstitutional runs from the date of the allegedly discriminatory decision, and not from the later date, following the pursuit of administrative appeals, upon which the decision becomes effective to interrupt employment. This Term, in *Chardon v. Fernandez*, —— U.S. ——, 50 L.W. 3441, the Court applied the holding of *Ricks* to a similar action brought under § *1983*. In light of *Tomanio*, *supra*, only the Court's implicit assumption that exhaustion of administrative remedies is not required in § 1981 and § 1983 actions can account for the Court's rulings in these cases.

Finally, this Term, in *Fair Assessment in Real Estate Association, Inc. v. McNary*, —— U.S. ——, 50 L.W. 4017, the Court held that the principle of comity bars damage actions under § 1983 to redress the allegedly unconstitutional administration of a state tax system, reasoning in part that

> [T]he intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape*, *supra*. Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety. [50 L.W. at 4021, see also *id.* at 4018.]

B.

In light of the repeated holdings of this Court over two decades that exhaustion of state administrative remedies is not required under § 1983, the doctrine of *stare decisis* strongly counsels against reexamination of that question. As stated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-737:

> [C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free

> to change this Court's interpretation of its legislation. See *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting). This presumption of adherence to . . . prior decisions construing legislative enactments would support . . . reaffirmance of [those decisions] . . . even if the Court were persuaded that [a contrary decision] is more consistent with the policies underlying the [statute] than is the [existing] rule.[4]

Accordingly, even if Congress had merely "remained quiet in the face of [the Court's] many pronouncements on the scope of § 1983", *Maine v. Thiboutot*, 448 U.S. 1, 8, it would not be appropriate for the Court now to undo the well-settled rule that exhaustion of state administrative remedies is not required under § 1983.[5]

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[4] See also *Edelman v. Jordan*, 415 U.S. 651, 671 n. 14, quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (Brandeis, J., dissenting):

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.

And see *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 510-511 (Rennquist, J., dissenting).

[5] The court below, while recognizing "the numerous instances in which the Court has stated in opinions, apparently quite categorically, that exhaustion is not required in section 1983 cases," undertook to demonstrate that in each instance "the state remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." 634 F.2d at 906. Whether or not the cases *could* have been decided on such a ground, the fact remains that they *were not* so decided. To the contrary, in *Damico*, and again in *Houghton* and *Wilwording*, the Court took care to emphasize that exhaustion is not required regardless of the adequacy or inadequacy of particular administrative remedies. The determinative question for *stare decisis* purposes is whether Congress could have misunderstood this Court's prior rulings; those rulings did not leave room for misundertanding, and in any event we know that Congress did not misunderstand them (see pp. 10-12, *infra*).

But here the constraints of precedent are far more compelling, for Congress has not remained silent, but by its words and actions has expressed its recognition and acceptance of the no-exhaustion rule established in this Court's decisions. In Section 7 of the Civil Rights of Institutionalized Persons Act, P.L. 96-247, 94 Stat. 349 (1980), Congress adopted an exhaustion requirement for § 1983 suits brought by "adult[s] convicted of a crime confined in any jail, prison, or other correctional facility . . . ." 42 U.S.C. § 1997e(a)(1) (Supp. 1980). Under the statute, such persons can be required to exhaust "plain, speedy, and effective administrative remedies" that "are in substantial compliance with . . . minimum acceptable standards" promulgated by the Attorney General. § 1997e(a)(2).[6] If an adult prisoner has failed to exhaust such a remedy, the court may "continue [his § 1983] case for a period of not to exceed ninety days in order to require exhaustion" if the court finds "that such a requirement would be appropriate and in the interests of justice," § 1997e(a)(1).

From the hearings and debates leading up to the passage of this Act, several points that bear directly on the question presented by this case can be stated with certainty.

First, Congress fully understood that as it stands, § 1983 does not require exhaustion of administrative remedies. Representative Butler, a member of the subcommittee that first drafted the provision that became § 7, explained:

> [Section 7] provides that in certain cases a Federal judge may require a State prisoner, who has filed a 1983 petition, to go back and exhaust his State grievance procedure.
>
> * * * *

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[6] The Act specifies detailed safeguards that are to be included in the Attorney General's standards, see p. 15, *infra*.

> *Under existing law there is no requirement that a complainant first ask the State prison system to help him. He can file his grievance directly in the federal court and his case has to be investigated by that court . . . .* [125 Cong Rec. H 3641 (daily ed. May 23, 1979).]

Similarly, Representative Sawyer expressed the view that § 7 would "go a long way to diminish section 1983 lawsuits, under which . . . State prisoners can go directly into Federal court with an action . . . ." *Id.* at H 3643. And in the prior Congress, where the House had passed a bill containing a provision virtually identical to § 7,[7] Representative Wiggins had stated:

> Mr. Chairman, it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action. For many years, some of us have felt that the requirement of exhaustion of remedies would be desirable in the case of 1983 actions, but for various reasons it has been impossible to implement this requirement. The bill, however, makes a modest approach at an exhaustion of remedies requirement [124 Cong. Rec. H 7481 (daily ed. July 28, 1978)].

Similarly, Representative Ertel said:

> At the present time under 1983 a State prisoner can come directly into Federal court, file his petition with no notification to the State whatsoever, and the Federal court must take jurisdiction of that action under 1983.
>
> * * * *
>
> What section [7] does is require a prisoner to go to the State system before he goes into Federal court.
>
> * * * *

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[7] In the 95th Congress the proposed legislation died in the Senate without a vote, due to a lack of time in the closing sessions. See Hearings on H.R. 10 before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 96th Cong., 1st Sess. (hereinafter "1979 Hearings") at 1 (1979) (remarks of Rep. Kastenmeier).

> This has been one of the biggest controversies that has existed in 1983 that I know of, which is the fact that they can move directly into Federal court . . . . [*Id.* at H 4624 (daily ed. May 25, 1978)] [8]

Congress therefore enacted section 7—which was "strongly endorsed by the states"—in order to "*permit*"

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[8] In the hearings that preceded the enactment of the statute, numerous witnesses stated flatly that § 1983 does not require exhaustion of administrative remedies, and no witness suggested anything to the contrary. Thus, Assistant Attorney General Drew Days testified:

> . . . I think it is important to understand something about the background of exhaustion requirements insofar as section 1983 . . . is concerned. The Supreme Court has repeatedly declined to require that a plaintiff in a section 1983 action exhaust State remedies, either judicial or administrative. The basis for that position taken by the Supreme Court is articulated in a case called the *McNeese* case . . . .

Hearings on H.R. 2439 and H.R. 5791 before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 1st Sess. (hereinafter "1977 Hearings") at 20 (1977). Mr. Days added that any exhaustion requirement adopted by Congress "would in fact be novel in light of the long and consistent history of case law in the 1983 area." *Id.* at 33. See also *Id.* at 323. Similarly, a spokesman for the American Bar Association advised the subcommittee that the ABA opposed the adoption of any exhaustion requirement for prisoner cases, because no other § 1983 plaintiffs are required to exhaust administrative remedies: "[C]reating an exhaustion requirement applicable to prisoners would make them in essence second class citizens, since other Americans face no similar obstacles to bringing Federal suits to secure federally protected rights." *Id.* at 47. Similar accounts of existing law were given by other witnesses throughout the 1977 hearings. See *id.* at 49, 52 (statement of Hon. Sylvia Bacon on behalf of the ABA); *id.* at 69, 77 (testimony of Jay Lichtman on behalf of National Legal Aid and Defender Association); *id.* at 253 (testimony of Stephen Berzon on behalf of the Children's Defense Fund); *id.* at 267 (statement of Michael Lottman on behalf of the Education Law Center); *id.* at 513-514 (letter of Prof. Richard Singer). In the 1979 hearings, the same point was made by the American Civil Liberties Union (see 1979 Hearings, *supra*, at 48), the ABA (*id.* at 340-341), and the NAACP Legal Defense and Educational Fund (*id.* at 349).

a federal court to order a continuance for the purpose of exhausting administrative remedies in the narrow circumstances specified in the legislation. *Id.* at H 3358 (daily ed. May 1, 1978) (remarks of Rep. Kastenmeier, Chairman of the House Subcommittee on Courts, and principal sponsor of the legislation) (emphasis added). See also H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980) (§ 7 will *"allow* a court to continue a case for a limited period of time") (emphasis added).

Second, in making what it knew to be the first incursion upon the no-exhaustion principle of § 1983, Congress was extremely selective. It did not, of course, impose an exhaustion requirement for all § 1983 actions; and, even more revealing, it did not impose an exhaustion requirement even as to all persons covered by the bill it was enacting. The Institutionalized Persons Act applied generally to a much broader category of persons in "institutions," § 1997(1), but the section of the Act creating an exhaustion requirement was limited to convicted adult prisoners (thus imposing no exhaustion requirement upon those in institutions other than correctional facilities, nor upon youth and non-convicted adults in correctional facilities, all of whom were covered by the Act's other provisions).

As the legislative history makes clear, Congress was not hostile to this Court's general "no exhaustion" construction of § 1983. On the contrary, aware that *any* legislative move toward exhaustion might be "resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions . . .—temporarily in any event—back into the State system," 1979 Hearings, *supra* at 26 (remarks of Rep. Kastenmeier),[9] Congress

[9] Several organizations did in fact oppose the measure for that reason. See the testimony cited in note 8, *supra*, on behalf of the American Bar Association, American Civil Liberties Union, NAACP Legal Defense and Educational Fund, National Legal Aid and Defender Association, Children's Defense Fund, and Education Law Center.

acted only because it concluded that prisoner suits presented a unique problem warranting a unique solution (*i.e.* an exhaustion requirement). A recurring theme sounded by the legislators was that prisoner suits require special treatment because, as the Senate Report put it, "[t]he almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. Many of these complaints are pro se and often poorly drafted in terms of presenting the problem in a legal context." S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979).[10] Congress also believed that development of meaningful grievance procedures would be particularly desirable in the prison context, because such procedures could boost morale, settle disputes before they escalated, and generally improve the functioning of prisons.[11] Concluding that these objectives would be served by the development and compelled utilization of prison grievance procedures, Congress enacted § 7, which "has application only to the prison problem." 125 Cong. Rec. H 3648 (daily ed. May 23, 1979) (remarks of Rep. Gudger).

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[10] See also 125 Cong. Rec. H 3639 (daily ed., May 6, 1979) (remarks of Rep. McClory); *id.* at H 3635 (remarks of Rep. Harris); *id.* at H 3641 (remarks of Rep. Butler). In the hearings, Representative Railsback, who was the author of § 7 (see 1979 Hearings, *supra* at 3), explained that an exhaustion requirement for prisoner suits was warranted in light of the fact that "[s]uch suits are . . . approximately 5 percent of the civil caseload of all federal district courts. A petition filed under 1983 is handwritten by the inmate without the assistance of a lawyer and is very difficult to process." *Id.*, at 4. See also 124 Cong. Rec. H 3358, 3365 (daily ed., May 1, 1978) (remarks of Rep. Railsback).

[11] See 124 Cong. Rec. H 3358-3359 (daily ed., May 1, 1978) (remarks of Rep. Railsback); 1977 Hearings, *supra*, at 147-148 (remarks of Rep. Railsback); H. Rep. No. 96-80, 96th Cong., 1st Sess. 23-24 (1979). Some advocates of prisoners' rights agreed with that assessment. See 1979 Hearings, *supra*, at 91 (testimony of the Office of Public Advocate for the State of New Jersey).

Third, even for the narrow category of persons to whom an exhaustion requirement was made applicable by the Act, Congress did not enact the "traditional" exhaustion requirement with its "traditional exceptions" —the standard read into § 1983 by the court below (634 F.2d at 903-904). Instead, Congress constructed an entirely novel scheme, under which the Attorney General is to promulgate "minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances," containing at least five unique features:

> (1) "an advisory role for employees and inmates . . . in the formulation, implementation, and operation of the system" [§ 1997(e)(b)(A)];
>
> (2) "specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system" [*id.*, (B)];
>
> (3) "priority processing of grievances . . . of an emergency nature" [*id.*, (C)];
>
> (4) "safeguards to avoid reprisals . . ." [*id.* (D)]; and
>
> (5) "independent review of the disposition of grievances . . . by a person or other entity not under the direct supervision or direct control of the institution" [*id.*, (E)].[12]

Exhaustion can be required only if the institution's procedures are "in substantial compliance with" the Act's standards, § 1997e(a)(2),[13] and even then only if the

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[12] The five features are discussed in detail in H. Rep. No. 96-80, *supra*, at 23-24.

[13] The Conference Committee stated: "It is the intent of Congress that the phrase 'in substantial compliance with' means that there be no omission of any essential part from compliance, that any omission from compliance consists only of unimportant defects or omissions, and that there has been a firm effort to fully comply with the standards." H. Conf. Rep. No. 96-897, *supra*, at 17 (1980). See also H. Rep. No. 96-80, *supra*, at 25 (1979), S. Rep. No. 96-416, *supra*, at 34 (1979).

court finds that such exhaustion "would be appropriate and in the interests of justice," § 1997e(a)(1).[14] Moreover, institution of suit without prior exhaustion does not invite dismissal, but rather a continuance for at most 90 days during which the procedures must be pursued, *ibid.*[15]

In sum, the legislative response to this Court's holdings that exhaustion of administrative remedies is not required with respect to suits under § 1983 has been "something other than mere congressional silence and passivity," *Flood v. Kuhn*, 407 U.S. 258, 283. Congress is fully aware of this Court's decisions, and its failure to enact a general exhaustion requirement for § 1983 suits "has not been from inadvertence or failure to appreciate the effect of the Court's interpretation" of the statute. *United States v. South Buffalo R. Co.*, 333 U.S. 771, 774-775. Rather, Congress has deliberately chosen to enact a carefully-defined exhaustion requirement—one that could not be replicated by courts attempting to import a general exhaustion requirement into § 1983—to fit a class of

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[14] The Conference Committee stated: "It is the intent of the Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to 42 U.S.C. 1983 raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not appropriately be continued for resolution by the grievance resolution system." H. Conf. Rep. No. 96-897, *supra*, at 15. See also H. Rep. No. 96-80, *supra* at 25; S. Rep. No. 96-416, *supra* at 34.

[15] In civil rights legislation apart from § 1983, Congress, when it has opted to require exhaustion of state remedies, likewise has departed from "traditional" exhaustion concepts, in each instance adopting a precisely tailored exhaustion scheme. See, *e.g.*, Title II of the Civil Rights Act of 1964 (public accommodations), 42 U.S.C. §§ 2000a-3(c), 3(d), 6(a); Title VII of the Civil Rights Act of 1964 (employment), 42 U.S.C. § 2000e-5(c); Fair Housing Fair Act of 1968, 42 U.S.C. § 3610(c), (d).

§ 1983 cases in which Congress regards exhaustion as appropriate, leaving § 1983 otherwise unchanged. In the light of this Congressional response, the question is no longer open to reexamination by this Court; Congress has evidenced that *it* will define the occasions for requiring exhaustion (and the kind of exhaustion to be required), and its failure to date to do so more broadly "is persuasive evidence of the adoption by [Congress] of the judicial construction" that § 1983 does not require exhaustion of administrative remedies. *Missouri v. Ross*, 299 U.S. 72, 75. See also, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-488. Congress "has clearly evinced a desire not to disapprove [this Court's decisions] legislatively." *Flood v. Kuhn*, 407 U.S. 258, 283-284. The doctrine of *stare decisis* applies with its greatest force in such cases; indeed, in such cases the Court has declined to overrule precedents even where convinced that the earlier cases were wrongly decided. *Flood v. Kuhn*, *supra*; *United States v. South Buffalo R. Co.*, *supra*; *Laird v. Nelms*, 406 U.S. 797, 802.[16]

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[16] This case presents none of the circumstances in which the Court has found it appropriate to overrule a decision construing a statute notwithstanding the constraints of *stare decisis*. *In Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, the Court overruled its earlier holding in *Monroe v. Pape* that municipalities are not "persons" suable under § 1983. In so doing, the Court emphasized that *Monroe's* holding on that point had been "a departure from prior practice," 436 U.S. at 695, and was inconsistent with cases decided by the Court both before and after *Monroe* in which school boards had been held liable under § 1983, *id.* at 695-696. Similarly, the Court has in certain cases refused to follow a precedent found to conflict with "a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Boys Markets v. Clerks Union*, 398 U.S. 235, 241, quoting *Helvering v. Hallock*, 309 U.S. 106, 119. See also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47. No such basis for departing from *stare decisis* exists in this case.

Monell also turned on the fact that continued adherence to *Monroe's* holding with respect to municipal immunity "would itself be inconsistent with recent expressions of congressional intent." 436

II. THE CONGRESS THAT ENACTED § 1983 DID NOT INTEND THAT A PLAINTIFF BE REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES AS A PREREQUISITE TO SUIT UNDER § 1983.

We have shown that the Court should not undertake in this case to determine the correctness of its prior decisions holding that exhaustion of state administrative remedies is not required under § 1983; the matter should be regarded as settled, subject only to any action Congress might take to revise the law. But if the Court *were* free to reconsider the matter, the same result would be required, for it is clear that the Congress that enacted § 1983 did not intend that a plaintiff be required to exhaust state administrative remedies.

The question is one of statutory construction: did Congress, in enacting § 1983, intend that resort to the statute could only be had after a plaintiff had exhausted state administrative remedies? That this issue turns solely on "the construction of . . . § 1983" was recognized by the Court in *Monroe v. Pape*, *supra*, 365 U.S. at 168; and in *Monroe* and subsequent cases the Court has consistently based its holdings with respect to exhaustion of remedies in suits under § 1983 on the intent of the Congress that passed the statute, as reflected in the language of the statute and its legislative history. See *id.* at 170-183; *McNeese v. Board of Education*, *supra*, 373 U.S. at

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U.S. at 696-699. See also *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 497-498 (precedent may be overruled where subsequent action by Congress "has indicated that a number of premises" on which the prior decision was based were wrong). As we have shown, this case presents precisely the opposite circumstance—one in which Congress has understood and accepted this Court's rulings.

And finally, as we show in Part II, *infra*, this case, unlike *Monell*, is not one in which "it appear[s] beyond doubt from the legislative history" that the Court's prior decisions were wrong, 436 U.S. at 700. On the contrary, this case is one in which it is beyond doubt that the prior decisions were *right*.

671-673; *Damico v. California*, *supra*, 389 U.S. at 416-417; *Steffel v. Thompson*, *supra*, 415 U.S. at 472-473.[17]

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[17] This has been the Court's approach to resolving other questions as to the meaning of § 1983 as well. Just last Term, in addressing the question of the applicability of collateral estoppel in a § 1983 suit brought by a plaintiff following his conviction in a state court, this Court emphasized: "Our decision does not 'fashion' any doctrine of collateral estoppel at all. Rather, *it construes § 1983* to determine whether the conventional doctrine of collateral estoppel applies to the case at hand." *Allen v. McCurry*, 449 U.S. 90, 95 n. 7 (emphasis added). Thus, the Court based its decision in *Allen* on "the statute and its legislative history." *Id.* at 97.

Similarly, the Court has viewed the question of immunities from liability under § 1983 as "essentially one of statutory construction." *Owen v. City of Independence*, 445 U.S. 622, 635. See also *City of Newport v. Fact Concerts, Inc.*, —— U.S. ——, 49 L.W. 4860, 4862-63; *Gomez v. Toledo*, 446 U.S. 635, 639-640; *Monnell*, *supra*, 436 U.S. at 664-689, *Wood v. Strickland*, 420 U.S. 308, 314, 316; *Tenney* v. *Brandhove*, 341 U.S. 367, 372, 376. And see *Carey v. Piphus*, 435 U.S. 247, 255, 258-259 (determining the nature of damages that may be awarded under § 1983 by reference to the intent of the 1871 Congress).

The court below did not purport to find its exhaustion requirement in the intent of the Congress that enacted § 1983; rather, it proceeded as if the question whether to impose an exhaustion requirement is one of federal common law to be determined by the judiciary (634 F.2d at 902-903). Even if that were generally true of exhaustion questions—and it is not, see n. 18, *infra*, and cf. *Northwest Airlines, Inc. v. Transport Workers*, —— U.S. ——, 49 L.W. 4383—the courts would have no such freedom with respect to § 1983. For in light of Congress' recent actions, recounted above, it is clear that the choice whether (and in what instances) to establish exhaustion requirements under § 1983 (including the determination of the *kind* of procedures to be exhausted) is "a policy matter that Congress has reserved for itself," in which "th[e] courts are not free to fashion . . . new rules . . ." *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 269. "What Congress has done . . . is to make specific and explicit provisions," *id.* at 260, and "[u]nder this scheme of things, it is apparent that the circumstances under which [exhaustion is] to be required and the range of discretion of the courts in [requiring exhaustion] are matters for Congress to determine," *id.* at 262.

It follows that "the starting point in our analysis must be the language of the statute itself." *Owen v. City of Independence*, 445 U.S. 622, 635. See also *Gomez v. Toledo*, 446 U.S. 635, 640. By its terms, § 1983 makes "no mention of any requirement that state remedies be exhausted before resort to the federal courts could be had under 28 U.S.C. § 1343." *Fair Assessment, supra*, 50 L.W. at 4018. Instead, § 1983 provides unequivocally that "[e]very person" who, under color of state law, deprives another of federal rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Nor is this a statute that itself contains an administrative enforcement mechanism, such that a requirement to exhaust the "prescribed administrative remedy" can be inferred from the overall structure of the statute.[18] Rather, § 1983 is in no way "structured to require previous resort to state proceedings . . . ." *Board of Regents v. Tomanio, supra*, 446 U.S. at 490. We have read the legislative history of § 1983 in its entirety, and there is not a word to suggest that Congress meant to require exhaustion of state judicial or administrative remedies as a prerequisite to suit under § 1983.

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[18] *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. Cf. *McGee v. United States*, 402 U.S. 479, 484-485 n. 6 (exhaustion requirement may be inferred where necessary to preserve "the autonomy and proper functioning of the particular administrative system Congress has enacted"). The decisions of this Court that gave birth to the modern doctrine of exhaustion of administrative remedies were based on the rationale approved in *McGee*. See, e.g., *United States v. Sing Tuck*, 194 U.S. 161, 167 (1904) (exhaustion required where a statute, while not expressly mandating exhaustion, "points out a mode of procedure" that the Court concluded Congress intended "must be followed before there can be a resort to the court."). Cf. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439-441 (1907) (ICC must be given primary jurisdiction over claims challenging rates it has approved, in order to effectuate the statutory objective that uniform rates be established by an expert body).

While the absence in the statute and the legislative history of any indication that Congress intended to require exhaustion of state remedies might ordinarily end the matter, this Court has held that in certain instances limitations not stated in the language of § 1983 or in the legislative history may nevertheless be applied in suits under the Act, if they "were both 'well established at common law' and 'compatible with the purposes of the Civil Rights Act." *Gomez v. Toledo, supra*, 446 U.S. at 639, quoting *Owen v. City of Independence, supra*, 445 U.S. at 638. Thus, the Court has "on several occasions, found that a tradition . . . was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen, supra*, 445 U.S. at 637, quoting *Pierson v. Ray*, 386 U.S. 547, 555.[19]

That rule of construction has no application here, however, for in 1871 there was no "tradition" that administrative remedies had to be exhausted before a governmental body could be sued. On the contrary, the rule at that time was that exhaustion could not be required unless Congress expressly provided for exhaustion by statute.

For example, in *Clyde v. United States*, 13 Wall. (80 U.S.) 38 (1871), the Court considered a "rule of practice" adopted by the Court of Claims, under which a claim against the government would not be entertained by that court if "the case was such as is ordinarily settled in any executive department" and the claimant had failed "[to] show that [an] application for . . . allowance [of the claim] had been made to that department, and without success." The Supreme Court overturned

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[19] See also *City of Newport v. Fact Concerts, Inc.*, —— U.S. ——, 49 L.W. 4860, 4864; *Allen v. McCurry, supra*, 449 U.S. at 97-101; *Imbler v. Pachtman*, 424 U.S. 409, 417-424; *Wood v. Strickland*, 420 U.S. 308; *Tenney v. Brandhove*, 341 U.S. 367, 376.

the exhaustion rule the Court of Claims had adopted, stating (*id.* at 39):

> [W]e are of opinion that it was not competent for the Court of Claims to impose [such a rule] as a condition of presenting a claim in that court. Instead of being a rule of practice, it was really an additional restriction to the exercise of jurisdiction by that court. *It required the claimant to do what the acts giving the court jurisdiction did not require him to do before it would assume jurisdiction of his case.*
>
> The act of 1855, which created the court, declares that it shall "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein." The rule adopted by the court required that the claimant should not only have such a claim as stated in the act, but should have first gone through the department which might have entertained it, before he would be permitted to prosecute in that court. *This was establishing a jurisdictional requirement which Congress alone had the power to establish.* [Emphasis added]

In *The Collector v. Hubbard*, 12 Wall. (79 U.S.) 1 (1871), the Court discussed a statute that *did* expressly require exhaustion,[20] but observed that prior to its adoption no such exhaustion was required:

> [I]t is quite clear that [prior to the 1866 statute] the tax payer, if he was illegally assessed, might

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[20] The statute in question was the Act of July 2, 1866 (14 Stat. 152), which provided that "[n]o suit shall be maintained in any court for the recovery of any [federal] tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue."

> maintain an action . . . to recover back the amount . . . although he ha[d] not taken any appeal to the Commissioner of Internal Revenue.

For that proposition the Court cited *Philadelphia v. The Collector*, 5 Wall. (72 U.S.) 720, 730 (1867), where the Court rejected the theory that jurisdiction over suits to recover tax payments could be denied "because the party aggrieved may appeal to the commissioner for redress":

> Suffice it to say . . . that such a theory finds no substantial support in any act of Congress upon the subject or in any decided case.

And, in *Erskine v. Hornbach*, 14 Wall. (81 U.S.) 613, 615-616 (1872), the Court demonstrated how narrowly even express statutory exhaustion requirements were construed in that era: a statute requiring prior appeal to the Commissioner of Internal Revenue before suit could be filed to recover taxes was held not to require such a prior appeal to the Commissioner before an action in trespass could be instituted to recover property seized in the enforcement of an assessment.

The "tradition" as it stood in 1871, and indeed as it continued until early in the 20th Century, was accurately stated in a 1903 treatise: "unless there is statutory provision" requiring exhaustion,

> the law stands that although the matter may be brought before the administration [i.e., the agency] for its adjudication, it need not be so. A suit may be brought against the officer in the ordinary courts of law at any time.

Wyman, *The Principles of Administrative Law Governing the Relations of Public Officers* 339 (1903) (emphasis added).[21]

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[21] Of course, as the treatise noted, exhaustion of remedies could be required where explicitly mandated by statute. See, *e.g.*, *Cheatham v. United States*, 23 Wall. (93 U.S.) 85 (1876); *Nicholl v. United States*, 7 Wall (74 U.S.) 122 (1869).

Thus, exhaustion of administrative remedies was not required as of 1871 except where specifically mandated by statute; indeed, it was error for a court to require exhaustion except where commanded by statute. *Clyde v. United States, supra.* Accordingly, when Congress enacted § 1982 with no mention whatsoever of exhaustion, Congress could not have intended to require (or expected the courts to infer from its silence a requirement) that state administrative remedies be exhausted before suits would be entertained under the statute.

CONCLUSION

For the reasons set forth above, this Court should hold that exhaustion of state administrative remedies is not required in actions under § 1983.

Respectfully submitted,

RICHARD C. DINKELSPIEL
MAXIMILIAN W. KEMPNER
Co-Chairmen
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
Attorneys
Lawyers' Committee for
Civil Rights Under Law
733 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 628-6700

MICHAEL H. GOTTESMAN *
ROBERT M. WEINBERG
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
DAVID RUBIN
National Education Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 833-4451

Attorneys for Amici Curiae

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE AMICUS CURIAE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

ELLEN JOSEPHSON
NATIONAL LEGAL AID and DEFENDER ASSOCIATION
1625 K Street, N.W.
8th Floor
Washington, D.C. 20006
(202) 452-0620

STEVEN H. STEINGLASS
CLEVELAND-MARSHALL COLLEGE OF LAW
Cleveland State University
18th & Euclid
Cleveland, OH 44115
(216) 687-2525

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1874

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR THE AMICUS CURIAE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

The National Legal Aid and Defender Association (NLADA) files this Amicus Curiae brief with the consent of all parties.

INTEREST OF AMICUS CURIAE

NLADA is a not- for -profit organization whose purpose is to ensure that effective legal representation is available to persons unable to afford counsel due to their poverty. Its members include the great majority of legal services offices, public defender agencies, and coordinated assigned counsel systems throughout the United States. NLADA also includes two thousand individual members, most of whom are private practitioners.

NLADA joins petitioner in seeking reversal of the decision of the United States Court of Appeals for the Fifth Circuit. The court below held that persons are required to exhaust adequate administrative remedies before bringing a civil action pursuant to 42 U.S.C. § 1983.

Because of NLADA's long involvement in the effort to provide the poor with meaningful access to justice, it has a unique interest in the questions presented by the instant case. Section 1983 has played a critical role in giving poor Americans the procedural means to challenge, in a timely and efficient manner, violations under color of state law of their federal constitutional and statutory rights. The introduction of even a limited administrative exhaustion requirement would significantly burden the ability of NLADA's members to represent their clients effectively in these claims. Further, the additional demands placed on counsel by such a requirement would exacerbate the very basic problem of the availability of counsel to the poor, already reaching crisis proportions due to substantial reductions in funding of the Legal Services Corporation.

NLADA also believes that fundamental federally created constitutional and statutory rights are most secure if persons injured by putatively illegal actions by state or local officials have the maximum freedom to choose the remedy they believe is most likely to redress their grievance, whether it be judicial or administrative. The imposition of even a limited exhaustion of administrative remedies requirement in § 1983 cases, no matter how reasonable such a requirement appears on the surface, will impose significant burdens on courts and litigants while neither making federal rights more secure nor achieving the benefits commonly advanced as the reason for such a requirement.

As a result, NLADA, on behalf of its members and their clients, submits this brief urging reversal of the decision of the Fifth Circuit.

SUMMARY OF ARGUMENT

The imposition of a requirement that § 1983 plaintiffs exhaust adequate administrative remedies will substantially burden courts and litigants without providing off-setting benefits. There are literally thousands of state and local bodies which can be said to be making administrative decisions. There is little uniformity among them and their procedural regularity varies widely. Determinations of adequacy, which will involve difficult questions of fact and law, will have to be made on a case-by-case basis.

It is difficult to justify this burden as there is no showing that litigants do not currently use adequate administrative remedies. An example of the wide use made of these remedies is found in the Aid To Families With Dependent Children Program, 42 U.S.C. §§ 601 *et seq*. More than 99.85% of persons aggrieved by their state's implementation of the federal welfare law pursue their grievances through state administrative procedures rather than the federal courts. The argument that the principal result of even a limited exhaustion requirement will be an increased burden on the courts is supported by the experience of the Second Circuit which has had such an exhaustion requirement for twelve years. Exhaustion has been frequently litigated but rarely required.

An exhaustion requirement will also make civil rights less secure. First, it puts a premium on a litigant's ability to accurately anticipate a court's decision regarding the adequacy of a particular remedy, imposing a heavy penalty on those who guess incorrectly. A litigant who first goes to court but whose case is dismissed for failure to exhaust may be time-barred from invoking a once available remedy and would thus be without any forum. Others who first exhaust lengthy administrative remedies could be prevented from ever filing in court due to statute of limitations problems. Further, because res judicata does not apply to administrative decisions and class relief is

largely unavailable, an exhaustion requirement will preclude the uniform application of federal law.

Finally, the policy reasons cited by the court below in support of an exhaustion requirement do not hold up under scrutiny. First, given the burdens placed on the court by the difficult determination of adequacy, and the fact that Congress has recently imposed a limited exhaustion requirement in prisoner civil-rights cases which comprise over half of all federal court civil rights litigation, arguments that it is necessary to achieve judicial economy cannot stand. Second, since the Article III requirement of ripeness applies to civil actions the benefit to be gained by an exhaustion requirement in this regard is unclear. Third, improvements in the administrative process will encourage litigants to use non-judicial remedies; litigants should not be deprived of their judicial forum because of a general belief that this will somehow lead to better administrative procedures. Fourth, litigants already use those remedies which are simpler, speedier, and less expensive so long as they are perceived as fair. Fifth, the invocation of federalism as a justification for requiring exhaustion is based on the simplistic notion that federalism means automatic deference to any asserted state interest. The better view is that federalism demands a careful balancing of federal and state interests. In the § 1983 context, this balance argues strongly in favor of retaining a plaintiff's choice of forum.

ARGUMENT

A. A Requirement That Section 1983 Plaintiffs Exhaust Adequate Administrative Remedies Will Substantially Burden the Judicial System Without Providing Off-Setting Benefits

1. *Litigants And Courts Will Face Complex And Time-Consuming Threshold Questions Regarding The Adequacy Of Particular Remedies*

Litigants who file § 1983 actions without first submitting to an administrative procedure they believe to be inadequate will

face a burdensome threshold inquiry into the adequacy of the administrative remedy.

Unlike the situation which exists for the federal government where Congress has established a single set of detailed procedures that govern the adjudicatory process, *see*, Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, administrative procedure at the state level is complex, confusing, and anything but uniform. [1] There are a great number of administrative procedures and many varying forms of individual claims; attempts to evaluate the adequacy of a particular procedure will typically present difficult questions of first impression. [2]

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[1] In his study of state administrative law for the American Bar Foundation Professor Frank E. Cooper reported that: "In point of sheer numbers, the proliferation of state agencies is impressive. In several states, as many as sixty or seventy independent agencies make rules and adjudicate contested cases affecting in varied ways the lives, health, fortune, safety, labor and the business of millions of citizens. At a conservative estimate, more than 2000 state administrative agencies are exercising legislative and judicial functions. In carrying out their duties they are to a large degree independent of the legislatures and the courts. Further, they are significantly independent of each other. This self-assertive independence of the state agencies is reflected not only in the baffling heterogeneity of procedural rules, which is the source of needless confusion, but more importantly, in the widely disparate approaches to related problems, and in the appreciation of variant principles and philosophies of economic and social control." F. Cooper, STATE ADMINISTRATIVE LAW 1-2 (1965).

[2] While almost all states have now adopted some state-level administrative procedure act, *see* Gellhorn, Byse & Strauss, ADMINISTRATIVE LAW: CASES AND COMMENTS 1148 (7th Ed. 1979), these acts differ from state to state, and only 28 states have adopted legislation based at least in part on the Model State Administrative Procedure Act advanced by the Commissioners on Uniform State Laws. 1 K. Davis, ADMINISTRATIVE LAW TREATISE, § 1:11, at 37 (1978). Even those states which have adopted the Model Act are far from solving the problems identified by Amicus. Professor Davis has extensively criticized the Model Act and has concluded that "The Model Act is something less than a model of what a state APA should be." *Id.* at 51.

Local administrative procedures, which are at an even more primitive stage than at the state level, will pose more problems. State administrative procedure acts do not apply to local administrative decision-makers,[3] and no uniformity move has developed at the local level. Moreover, there are literally thousands of local decision-making bodies that can be said to be making "administrative decisions." These run the gamut of local concerns and have widely varying powers and public visibility. Some are completely obscure except to the bureaucrats charged with administering them.

In order to proceed to the actual determination of the adequacy of any one of this multitude of procedures, this Court as well as the circuit and district courts around the country will first have to develop legal standards for what is an extremely elusive concept in the civil rights context. Questions which will have to be considered will include, at a minimum, the scope of interim and permanent relief available and specifically whether damages or binding injunctive relief may be ordered, the finality of the administrative decision, the length, formality and complexity of the administrative process, the impartiality of the decision-maker and the extent to which the decision-maker was responsible for the underlying decision, and the public awareness of the administrative process itself.[4]

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[3] State administrative procedure acts have generally been held to not be applicable to local administrative bodies, and Antieau has identified only one state that has adopted a broadly applicable local administrative procedure act. Antieau, MUNICIPAL CORPORATION LAW ¶ 3A.08 (1981). *See* also Davis, § 1:10, at 36 (1978).

[4] An additional legal question is the placement of the burden of going forward and the burden of proof on the questions of exhaustion and adequacy. Amicus submits that should even a limited exhaustion requirement be adopted by this Court both of these legal burdens should be on the defendants, who should have to identify the remedies they believe are clearly adequate to vindicate the plaintiff's federal rights.

In light of this, Amicus believes that the disposition of this case by the Fifth Circuit is wrong. In reversing the district court, the court of appeals reman-

In addition to difficult legal issues, many cases will raise complicated questions of fact, requiring discovery and evidentiary hearings. In some instances, the adequacy of the remedy will be the only matter of factual dispute with the result that courts will be required to hold hearings in cases that could otherwise be resolved by a simple motion for summary judgment. The entire process will inevitably be protracted and cumbersome, demanding a great deal of time and effort to be expended by both courts and litigants.

2. *Litigants Use Administrative Remedies Which Are Adequate*

If there were any indication that litigants are frequently and willfully avoiding administrative procedures capable of fully and fairly adjudicating their claims there might be an argument to focus this very substantial amount of court and litigant time on the exhaustion question. Such evidence, however, is singularly lacking. Section 1983 plaintiffs, particularly those represented by counsel, do not make idle choices as to forum. They are extremely unlikely to bypass simple, speedy and inexpensive procedures perceived as just and capable of fully resolving their claim. There is no magic in bringing a case in the federal courts, particularly if it will involve a great deal of time and money with only an uncertain result.

The argument is perhaps most effectively made by looking at those situations where potential § 1983 plaintiffs do use their administrative remedies. An excellent example is found in the Aid to Families With Dependent Children (AFDC) program, 42 U.S.C. §§ 601 *et seq.*, where participating states are required

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ded with directions to permit the plaintiff to amend her complaint. However, this incorrectly assumes an extra pleading burden on plaintiff. *Cf. Gomez* v. *Toledo*, 446 U.S. 635 (1980), where the Supreme Court ruled that the burden is on the defendant in a § 1983 case to plead good faith as an affirmative defense where a good faith immunity might apply. There is no requirement that a plaintiff allege that a defendant acted in bad faith.

to maintain a "fair hearing" procedure which complies with federal guidelines.

The most recent year for which figures are available on numbers of administrative appeals and federal court claims is 1979. In fiscal year 1979, 118,664 requests for fair hearings in AFDC cases were received by state agencies *excluding* Maryland and Ohio, which did not supply data.[5] During calendar year 1979 a total of 186 welfare cases were filed in the federal courts.[6] In other words, more than 99.85% of persons aggrieved by their state's implementation of federal welfare law recognized that it was most appropriate to pursue their claims through the state administrative procedures and not through the federal courts.[7]

While inevitably a certain percentage of state and local administrative procedures will be found to be adequate, Amicus submits that the proportion will be low indeed. The present voluntary model where plaintiffs and their attorneys seek out the most appropriate forum — judicial or administrative — works and should be continued.

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[5] Office of Policy, Office of Research Statistics, Social Security Administration, U.S. Dep't of Health and Human Services, REQUESTS FOR A.F.D.C. HEARINGS IN PUBLIC ASSISTANCE, FISCAL YEAR 1979, at 4 (1981).

[6] Administrative Office of the U.S. Courts, FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE TWELVE MONTH PERIOD ENDED DECEMBER 31, 1979, at A-10 (1980). Amicus recognizes that the two time periods are not identical, but the figures are equivalent from year to year, and the skew is so staggering that the validity of the point is not diminished. Further, the "welfare" category used by the Administrative Office of the Courts encompasses more than just AFDC cases.

[7] Further, there is no indication that the 0.15% of persons who go to federal court in AFDC cases did not first use their state administrative remedies.

3. *The Second Circuit Experience*

Amicus' concerns regarding the burdensome and ineffective nature of a requirement that § 1983 plaintiffs first exhaust adequate administrative remedies are by no means theoretical. Prior to the decision below, the Second Circuit had a longstanding requirement that adequate administrative remedies be exhausted in § 1983 cases, *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). A review of the Second Circuit's experience with *Eisen* fully supports Amicus' arguments.

The starting and most telling point of the analysis is that exhaustion has been frequently litigated but only rarely required in the twelve years since *Eisen* was decided. Adequacy has been strictly defined: a federal court must "be positively assured — it may not presume — that there are speedy, sufficient, and readily available administrative remedies remaining open to pursue." *Morgan* v. *LaVallee*, 526 F.2d 221, 224 (2d Cir. 1975). Although the courts have had to carefully examine and pass judgment on the adequacy of dozens of state and local exhaustion schemes, *see infra*, the great majority have simply not passed muster.

The Second Circuit courts have faced a wide variety of novel questions regarding adequacy which they have had to decide on a case by case basis. The courts have refused to require exhaustion where the administrative decision maker had promulgated the complained of rule or had previously taken a position regarding it, *Hark* v. *Dragon*, 611 F. 2d 11 (2d Cir. 1979); *Goetz* v. *Ansell*, 477 F. 2d 636 (2d Cir. 1973); *Romano* v. *Kirwan*, 391 F. Supp. 643 (W.D.N.Y. 1975) *vacated and remanded on other grounds*, 425 U.S. 929 (1976); *Sostre* v. *Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970); where the decision-maker may be biased, *Fitzgerald* v. *Cawley*, 368 F. Supp. 677 (S.D.N.Y. 1973); where damages were requested but there was no authority to award them, *Plano* v. *Baker*, 504

F. 2d 595 (2d Cir. 1974);[8] *Ray* v. *Fritz*, 468 F. 2d 586 (2d Cir. 1972); or where any administrative order would have to be judicially enforced, *Hupart* v. *Board of Higher Education of City of N.Y.*, 420 F. Supp. 1087 (S.D.N.Y. 1976).

Exhaustion has not been required if the claim turns on factual issues and there is no adequate fact-finding mechanism, *Gonzalez* v. *Shanker*, 533 F. 2d 832 (2d Cir. 1976); *Plano* v. *Baker*, *supra;* if there is no provision for representation of counsel, testimony under oath or subpoena of witnesses or papers, *Gonzalez* v. *Shanker*, *supra;* if it would cause substantial delay, *Hark* v. *Dragon*, *supra; King* v. *Norton*, 336 F. Supp. 255 (D. Conn. 1972); if the claim is on behalf of a class but only individual relief is available, *Swan* v. *Stoneman*, 635 F. 2d 97 (2d Cir. 1980); or if it would be for other reasons futile, *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971); *Lollis* v. *N.Y. State Dept. of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970).

Although most cases have dealt with the fashioning of exceptions to *Eisen*, courts have also had to struggle with the basic question of whether the alleged remedies were actually available. *Russo* v. *Central School District No. 1*, 469 F. 2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *Perzanowski* v. *Saivio*, 369 F. Supp. 223 (D. Conn. 1974).

The Second Circuit has also relied on traditional exceptions to the exhaustion rule. For example, exhaustion has not been required where the challenge is to the adequacy of the very remedy which would have to be exhausted, *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *Fuentes* v. *Roher*, 519 F. 2d 379 (2d Cir. 1975); *Carter* v. *McGinnis*, 351 F. Supp. 787 (W.D.N.Y. 1972).

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[8] The *Plano* court points out that a mere boilerplate claim for damages will not circumvent an exhaustion requirement; such claims must be carefully scrutinized for sufficiency. *See* note 9, *infra*.

In addition, the Second Circuit courts have generally not dismissed for failure to exhaust where a constitutional claim is made. *Public Utilities Commission* v. *United States*, 355 U.S. 534 (1958); *Cordova* v. *Reed*, 521 F. 2d 621 (2d Cir. 1975). *But see Blanton* v. *State University of New York*, 489 F. 2d 377 (2d Cir. 1973). Most courts, however, have required that the constitutional claim be substantial in order to avoid an exhaustion requirement, *see, e.g., Cordova* v. *Reed, supra, Smith* v. *Carey*, 473 F. Supp. 268 (S.D.N.Y. 1979). This will engender complicated threshold inquiries which will only cause further delay.[9]

In sum, the Second Circuit's twelve-year history with an exhaustion requirement analogous to that imposed by the court below demonstrates few dismissals juxtaposed against the growth of a new and arcane area of the law. Far from expediting the speedy and efficient resolution of § 1983 claims, the principal result has been the waste of significant court and litigant time.

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[9] The problem raised by the required determination of substantiality is analogous to the jurisdictional problem which existed with respect to non-equal rights statutory § 1983 claims prior to the removal of the jurisdictional amount requirement in 28 U.S.C. § 1331. *See* Pub. L. No. 96-486. Under the analysis set forth in *Hagans* v. *Lavine*, 415 U.S. 528 (1974), courts were required to determine the substantiality of the jurisdiction-conferring constitutional claim even if the plaintiff could receive full relief on the basis of a pendent non-constitutional claim. It had been suggested that some litigants added non-essential, but substantial, constitutional claims to permit federal courts to hear the pendent federal statutory claims. A further problem which will have to be addressed is whether a claim under the Supremacy Clause will form a constitutional claim sufficient to avoid an exhaustion requirement. *Cf. Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979).

B. An Exhaustion Requirement in Section 1983 Cases Will Render Civil Rights Less Secure

Amicus' opposition to an exhaustion requirement is based on more than the time-consuming and wasteful threshold inquiry it will engender. Important as these problems of delay and burdensomeness are, of equal concern is the fact that with an administrative exhaustion requirement, several classes of injured persons will fail to receive any relief at all for demonstrable violations of their rights. [10]

1. *Litigants Risk The Loss Of Any Adequate Forum If They Wrongly Anticipate A Court's Decision Regarding A Particular Remedy*

An administrative exhaustion requirement creates the very real risk that plaintiffs will lose any adequate forum in which to raise their claims if they wrongly predict whether a court will require the exhaustion of a particular remedy.

Litigants who believe the available remedies to be inadequate and go directly to court will, at a minimum, suffer a delay in their effort to obtain judicial vindication caused by the threshold determination of adequacy. However, because a plaintiff whose § 1983 case is dismissed for failure to exhaust may well be time-barred from invoking a once available administrative procedure, litigants could find themselves completely without a remedy. [11] *Cf. Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975).

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[10] This does not include those persons who have meritorious claims but find the quest for justice simply too burdensome, expensive or discouraging, and abandon it in frustration. The fact that these persons drop their § 1983 claims, thus reducing the burden on the courts, is hardly an argument for an exhaustion requirement.

[11] While it is not absolutely certain that a case would be dismissed, rather than stayed, upon a finding of failure to exhaust an adequate remedy, this was the decision of the court below and has been the course followed by the Second Circuit. *See, e.g., Blanton* v. *State Univ. of N.Y., supra.* A judicially-imposed dismissal rule would be far harsher than the exhaustion rule

Because of this burden and risk, many potential § 1983 plaintiffs will choose first to exhaust administrative remedies they believe to be inadequate. Thus injured persons will accept the likelihood of substantial delay, lack of interim relief, and the expense of duplicative proceedings, and go before a body that is incapable of or unlikely to provide adequate relief. These litigants, however, in spite of their caution and vigilance also face a major risk: they may be precluded from ever litigating their § 1983 claims in court because of statutes of limitations problems. Section 1983 does not contain a statute of limitations and this Court has instructed federal courts to utilize the relevant statute of limitations used in the state in which the federal court sits. Similarly, courts hearing § 1983 actions are also required to apply state policies on the tolling of the statute of limitations. *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). The absence of a federal rule on tolling will mean that in some cases the time expended in exhausting an administrative procedure will result in the running of the statute of limitations, which will deny the parties the ability ultimately to file a § 1983 action.

2. *An Exhaustion Requirement Will Preclude The Uniform Application Of Federal Law*

The doctrine of res judicata and the availability of class relief play an important role in ensuring that federal law is applied uniformly to similarly situated persons. Unlike orders in civil actions, however, administrative decisions are without res judicata effect. As a result, individual decisions will vary widely. *See* discussion in *Swan* v. *Stoneman*, *supra*, at 104-105. [12]

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mandated by Congress under the Civil Rights of Institutionalized Persons Act, which only permits the courts to stay prisoner § 1983 actions for up to 90 days to permit resort to administrative procedures that comply with guidelines promulgated by the U.S. Attorney General. 42 U.S.C. § 1997e.

[12] The lack of res judicata effect also means that administrative decisions will be completely relitigated in the courts, causing further burden and delay.

The problem will be further exacerbated by the fact that class relief is rarely available in administrative hearings. Class actions have been essential to the efforts of the poor and minorities to redress state and local violations of their federal civil rights. Not only have they produced uniformity in the law while achieving significant economies for both courts and litigants, they have also guaranteed that persons who fail to bring claims "because of fear, ignorance, or lack of resources . . . ," Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COL. L. REV. 1201, 1208 (1968), will nonetheless be protected through the assistance of representative parties. *See also Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 586 (1975).

The lack of availability of class treatment and res judicata effect is troubling from another perspective. By favorably settling claims at the administrative level, defendants will be able to moot out individual cases while preserving putatively illegal system-wide practices. [13] In a judicial setting, a case brought as a class action can continue to resolution even if the named plaintiff's claims become moot. *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *cf. Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980). Again, all too often, it will be those most in need of help but without the ability to protect their own interests who will be denied relief as a result of this practice.

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[13] This would be similar to the Social Security Administration's frequent policy of "non-acquiescence," whereby it refuses to apply an individual adverse decision beyond its facts. *See, e.g., Levings* v. *Califano*, 604 F.2d 591 (8th Cir. 1979) and the subsequent administrative non-acquiescence ruling at Social Security Ruling #80-11c. See also discussion in *Swan* v. *Stoneman, supra*, at 105.

C. No Significant Policy Benefits Will Result From The Adoption Of An Exhaustion Of Administrative Remedies Requirement in § 1983 Cases.

The court of appeals based its decision that § 1983 contains an exhaustion of administrative remedies requirement in part on a review of policy considerations. The court concluded that the adoption of an exhaustion of administrative remedies requirement in § 1983 cases will result in (1) a wiser allocation of judicial resources; (2) the assurance that the action complained of is "final within the institution in the sense that it is ripe for adjudication;" (3) improvements in the administrative process; (4) the use of simpler, speedier, and less expensive remedies; and (5) an advancement of federalism and comity.

Amicus submits that, to the contrary, the argument that tangible policy benefits will result from the adoption of an exhaustion of administrative remedies requirement in § 1983 cases is based on incorrect assumptions about the nature and scope of the § 1983 exhaustion problem as well as questionable assumptions as to how litigants and institutions behave. To the extent that benefits may flow from the exhaustion of administrative remedies in potential § 1983 cases, they are far more likely to result from a voluntary exhaustion policy than from the imposition of even a limited mandatory exhaustion requirement.

First, the court of appeals' decision is based in large part on the assumption that there currently is a serious problem of litigants filing § 1983 actions without first exhausting adequate state administrative remedies. However, nowhere does the court cite evidence to support the existence of a problem. Further, the court does not even mention the recently enacted Civil Rights of Institutionalized Persons Act which contains an exhaustion requirement for prisoner § 1983 cases where the available remedies meet certain standards. 42 U.S.C. § 1997e. As a result of this Act, over half of all § 1983 cases filed in the

federal courts are now subject to an exhaustion of adequate administrative remedies requirement. [14] Congress recognized a problem in the number of § 1983 cases and took very specific action to solve it. *See* S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979).

In addition, available information, *see* discussion, *supra*, regarding the Second Circuit experience, strongly suggests that the marginal decrease in the number of non-prisoner § 1983 cases from a limited exhaustion requirement will be minimal. Moreover, courts and litigants will be required to devote substantial resources to questions involving the adequacy of the administrative remedy. In sum, the argument that the courts should impose an exhaustion requirement to achieve judicial economies simply cannot stand.

Second, the court of appeals felt that a reasonable exhaustion requirement will assure that "the action complained of is final within the institution in the sense that it is ripe for adjudication." As part of this concept, the court identified notions of fairness under which grievance machinery should be given an opportunity to work before a defendant is required to respond to litigation.

Since the Article III requirement of a "case or controversy" includes the requirement that cases be ripe it is difficult to understand the advantage to be gained in this regard from an exhaustion requirement. Amicus must assume that the court of appeals is concerned primarily with the latter notion that it is somehow unfair to require a defendant to respond to litigation, where alternative grievance mechanisms may be available.

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[14] For the twelve-month period ending March, 1981, 15,409 prisoner civil rights claims were filed in the federal courts, as compared with 14,741 non-prisoner civil rights claims. Administrative Office of the U.S. Courts, FEDERAL JUDICIAL WORKLOAD STATISTICS FOR THE TWELVE MONTH PERIOD ENDED MARCH 31, 1981, at A-8, A-9 (1981).

However, to the extent defendants develop adequate grievance machinery that potential grievants respect and have confidence in, parties will voluntarily utilize those procedures. [15]

Third, the court of appeals suggests that " . . . a reasonable exhaustion requirement will improve the administrative process itself." Presumably this improvement would result from the increased respect given the state or local procedures. However, the court offers no empirical or other evidence to support this benefit, and the argument that the administrative process will improve because of the adoption of an exhaustion requirement in § 1983 cases is based only on faith. An equally plausible hypothesis is that the best way to improve state and local administrative processes is by continuing the no-exhaustion policy in § 1983 cases and permitting plaintiffs to have the freedom to chose which forum — administrative or judicial — they believe is most likely to protect their federal rights. [16]

Further, it should be noted that in creating the limited exhaustion requirement under the Civil Rights of Institutionalized Persons Act, *supra*, Congress by no means simply assumed that the state procedures would thereby automatically improve. Instead, Congress very carefully created a process under which the United States Attorney General would certify whether a particular grievance mechanism was adequate before exhaustion could be required. It would be ironic, indeed, if non-prisoner civil rights plaintiffs received less protections at the

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[15] Similarly, the absence of a doctrine of respondeat superior in § 1983 will protect defendants who bear no personal responsibility for the injury in question. *Monell* v. *Dep't of Social Services*, 436 U.S. 706 (1978); *Rizzo* v. *Goode*, 423 U.S. 362 (1976).

[16] Amicus suspects that the reality is that neither the presence nor absence of a § 1983 exhaustion requirement has had nearly as much impact on the quality of state or local administrative procedures as has resulted from *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and other procedural due process decisions of this Court.

hands of the courts than prisoners have as a result of congressional action.

Fourth, in characterizing administrative remedies as "generally simpler, speedier, and less expensive . . . " the court of appeals focused only on the benefits accruing to the defendant from solving conflicts with the least court costs and attorney time. However, under the current voluntary system plaintiffs already pursue the forum which will provide swifter and more efficient justice. A mandatory exhaustion requirement will only further burden courts and litigants.

Because none of the policy considerations advanced by the court below hold up under scrutiny, one is finally left with the argument that an exhaustion requirement should be imposed because it will serve the interests of federalism.[17] Such an argument, however, is based on the simplistic notion that federalism is advanced by an automatic deference to any asserted state interest. It ignores the more reasoned view that federalism demands a careful balancing of state and federal concerns. Further, it is incumbent upon the courts to defer to clearly stated congressional policy, where, as here, Congress has made the federal courts the primary "guarantor[s] of basic civil rights against state power." *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972).

Aside from the legislative history arguments which are developed in depth by other Amici, it is important to note that the intrusiveness of the great majority of § 1983 decisions, which are carefully limited to individual fact patterns, can easily be overstated. See *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1189 (1977); Comment,

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[17] Section 1983 cases are brought in state as well as federal courts. See, *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). The federalism arguments are totally inappropriate in state court cases.

Exhaustion of State Remedies Under the Civil Rights Act, supra.

This stands in stark contrast to the extreme intrusiveness of the process whereby federal courts would determine whether a particular state or local administrative remedy is adequate.

In addition, the federalism argument is inconsistent at best in light of the fact that federal "interference" is the *sine qua non* of any § 1983 case. For, in order for there to be a state sanctioned violation of a federal law, there necessarily has already been a federal "intrusion" into the state's prerogatives. See, *Developments in the Law, Section 1983 and Federalism, supra.*

Often such intrusion accompanies the provision of federal financial assistance and is voluntarily accepted by the states as the price of being able to provide necessary services to their citizens. This is particularly true of the state-federal benefit programs such as Aid to Families With Dependent Children 42 U.S.C. §§ 601 *et seq.* and Medical Assistance, 42 U.S.C. §§ 1396 *et seq.* which are of enormous importance of the clients of Amicus' members. It would be ironic to severely burden an individual's ability to enforce his or her federal rights in the name of federalism while permitting a state to enjoy unfettered benefit from its federal connection. [18]

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[18] The federalism argument also rings hollow when one considers that approximately 25% of the federal court caseload consists of diversity cases. Administrative Office of the U.S. Courts, (1981) *supra*, at note 14. This is three times greater than the percentage of all non-prisoner civil rights cases.

CONCLUSION

For the above-stated reasons Amicus Curiae National Legal Aid and Defender Association joins petitioner in urging this court to reverse the decision below and to remand the case for full consideration of the merits.

Respectfully submitted,

ELLEN JOSEPHSON
NATIONAL LEGAL AID
and DEFENDER ASSOCIATION
1625 K Street, N.W.
8th Floor
Washington, D.C. 20006
(202) 452-0620

STEVEN H. STEINGLASS
CLEVELAND-MARSHALL COLLEGE
OF LAW
Cleveland State University
18th & Euclid
Cleveland, OH 44115
(216) 687-2525

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 80-1874

Georgia Patsy,
Petitioner,

v.

Board of Regents of the State of Florida,
a body corporate, for and on behalf of,
Florida International University,

Respondents,

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION AND THE CITY OF HUNTSVILLE, TEXAS

Office and Post Office Address:

1020 Southwest Tower
Austin, Texas 78701
(512) 478-6601

DAVID J. LABREC, Counsel of Record
for Texas Municipal League, the
Texas City Attorneys Association
and the City of Huntsville, Texas

JOHN C. ROSS, JR.
President, Texas City Attorneys
Association

SCOTT BOUNDS
Chairman, Amicus Committee of
Texas City Attorneys Association
and City Attorney of Huntsville,
Texas

QUESTION PRESENTED FOR REVIEW

Is exhaustion of administrative remedies, if available, required before a governmental employee may bring a cause of action in federal court against a governmental entity under 42 U.S.C. s 1983?

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DAVID J. LABREC, Counsel of Record
for Texas Municipal League, the
Texas City Attorneys Association
and the City of Huntsville, Texas

JOHN C. ROSS, JR.
President, Texas City Attorneys
Association

SCOTT BOUNDS
Chairman, Amicus Committee of
Texas City Attorneys Association
and City Attorney of Huntsville,
Texas

Office and Post Office
Address:

1020 Southwest Tower
Austin, Texas 78701
(512) 478-6601

STATEMENT OF INTEREST OF AMICI

The Texas Municipal League is a nonprofit association of 830 municipalities, including the City of Huntsville, Texas. All of those cities are political subdivisions of the State of Texas. The Texas City Attorneys Association is the association of attorneys who act as legal counsel to those municipalities.

Texas cities collectively employ more than 100,000 police officers, firemen, refuse and utility workers, and a wide variety of other personnel in order to perform the many diverse services required of them.

Most cities provide to their employees written procedures which afford the employees an expeditious and orderly system of review of grievances. In some instances, those procedures may be inadequate or ineffective. However, the issue involved in this case is not the suffi-

ciency or insufficiency of those procedures, but rather whether local officials are to be totally deprived of the opportunity to deal with the grievances of their employees before resort is had to federal court under the auspices of 42 U.S.C. § 1983.

If effective administrative procedural remedies are available to protect the rights of government employees, then unnecessary clogging of federal court dockets is likely reduced. Contra, if local administrative remedies can be totally circumvented by merely citing 42 U.S.C. § 1983, then the danger of a wholesale forfeiture of the principle of local self-government arises and unnecessary federal intrusion into the activities of local governmental entities is encouraged.

SUMMARY OF ARGUMENT

This Court has not previously decided whether the issue of exhaustion of administrative remedies is a condition precedent to bringing an action against a governmental entity under 42 U.S.C. § 1983. A decision in this case, recognizing an exhaustion requirement of the type adopted by the Fifth Circuit below, would allow local governmental entities to conduct internal personnel management functions without compromising the constitutional rights afforded their employees. Such a requirement would be consistent with the purposes of § 1983 and the recent decisions of this Court. An uncompromising no-exhaustion rule, on the other hand, would often subject governmental entities and their employees to unnecessary expenses of litigation when adequate remedies are otherwise available. Moreover, such a rule would be inconsistent with the pur-

poses of § 1983 and would unnecesarily invade the province of authority of local governmental entities by involving the federal courts in local decisions that are not yet final and, in some cases, not yet even rendered.

ARGUMENT

I. A Logical Extension of the Monell Decision Requires Exhaustion of Administrative Remedies Prior to Institution of Federal Court Actions Against Governmental Entities by Aggrieved Employees Under 42 U.S.C. § 1983.

Prior to Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the federal appellate courts had consistently held that municipalities were not "persons" subject to monetary liability under 42 U.S.C. § 1983. See Monroe v. Pape, 365 U.S. 167 (1961). Local governments disciplined their employees virtually free

of scrutiny by the federal courts. The Monell decision of 1978, however, mandated for the first time that municipalities are "persons" under § 1983 and that they can be sued for monetary damages when the alleged illegal conduct implements a policy of the municipality itself. The Court emphasized in Monell that a respondeat superior relationship alone is insufficient to establish a cause of action under § 1983. After Monell, municipal liability is conditioned upon the "execution of government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy"[1] that in fact causes the deprivation of the constitutional rights of an employee.

In Owen v. City of Independence, 445 U.S. 622 (1980), this Court further expanded the scope of § 1983 liability of

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[1] 436 U.S. at 694

municipal entities. Speaking for the majority of the Court, however, Justice Brennan noted that the liability of local governments remains predicated upon unconstitutional action implemented by "a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. In this circumstance--when it is the local government itself that is responsible for the constitutional deprivation--it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government...." 445 U.S. 622, note 39.

After Monell and Owen, therefore, a local municipality may be liable under § 1983, but only where a plaintiff is injured by those who are "the final authority or ultimate repository of city power." Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980). In actions involving rights of public employees-such as the one presently before this Court--a local munic-

ipality cannot be held liable under § 1983 unless or until an official decision giving rise to the constitutional deprivation is made by the person or persons designated by the local governmental body as the final or ultimate authority to make such personnel decisions.

The violation of a constitutional right of a municipal employee should not give rise to a cognizable § 1983 cause of action unless the official causing the deprivation has the final or ultimate authority to make personnel decisions for the municipal entity. If the entity adopts no administrative remedy, then, consistent with Monell and Owen, the aggrieved employee may pursue his remedy directly to federal court under § 1983. Likewise, when the entity adopts and establishes an administrative remedy, then, consistent with Monell and Owen, the aggrieved employee must resort to those remedies before pursuing any direct

action under § 1983. If, as Petitioner contends, no exhaustion is required, then in the State of Texas alone over 100,000 municipal employees may address their personnel grievances directly to already overburdened Federal Courts. This Court has indicated in recent decisions that it is not the purpose of § 1983 to address matters which can better be resolved elsewhere. Parratt v. Taylor, 101 S.Ct. 1908 (1981); Fair Assessment In Real Estate Association Inc. v. McNay, 50 U.S.L.W. 4017 (December 1, 1981). Until the available administrative remedy has been exhausted, the municipality has taken no official action either as a "person" or "under color of law" to thereby cause a deprivation of a constitutionally protected right of the employee.

Many Texas cities presently have established written grievance procedures as part of their employee personnel policies.[2]

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[2]For example, a survey of 272 cities in Texas conducted in January, 1982 indicates

By adopting those procedures, these cities have designated their ultimate authority for personnel decisions. The act or edict of a public officer does not fairly represent the entity's official policy if the governmental body has vested final authority with a specific policymaker, whether it be the mayor, city council, personnel director, civil service commission or other policy-making authority. Local governmental entities think it simply unfair that they be summoned into federal court to defend against a constitutional claim when its policymakers have adopted policies to right the constitutional deprivations, but those policies are not given reasonable occasion to function.

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that 217 of those cities surveyed (80%) provide written grievance procedures to their employees.

II. A Rule Requiring Exhaustion of Adequate Administrative Remedies is Consistent with the Purposes Underlying 42 U.S.C. § 1983.

Congress has never intended that § 1983 be used to preempt the orderly administrative processes of the states and their political subdivisions. Nor does the historical development of § 1983 indicate that Congress ever intended for the federal judicial system to assume a role as the initial arbiter of public employee complaints, yet petitioner in this cause is asking the Court to place the federal judiciary in that untenable role. Amici submit that the answer lies somewhere short of an extreme that would totally preclude exhaustion of administrative remedies by employees of governmental entities. When there exists a fair, expeditious administrative procedure meeting the minimum conditions recited by the Fifth Circuit in the present case,

a rule requiring exhaustion would go far to protect the interests of petitioners and other potential § 1983 plaintiffs; to allow for a speedier adjudication to protect those interests; and to reduce the need for the use of limited federal judicial resources. Patsy, supra, at 912, 913. Many sound reasons support this approach.

First, a public employee will generally suffer no harm if required to exhaust a meaningful administrative remedy. No constitutional right is jeopardized by requiring that an employee first obtain a final decision from the entity that employs him before he files a federal court action. Unless he can show that irreparable harm will come to him in the course of obtaining the employer's final decision, a potential § 1983 plaintiff should not be allowed to sidestep the available administrative remedy. When no harm can be demonstrated, no cause of action is ripe for adjudication. (In the interest of brevity, Amici herein

adopt the argument in the Brief of Amici States, Section V (Ripeness).

Disputes involving governmental personnel are peculiarly conducive to resolution at the administrative level, especially when local governmental entities are concerned. In those instances, supervisory policymakers and employees often live and work in the same environment and have daily contact with one another. When given some incentive and opportunity to work toward amicable dispute resolution, those directly involved can often resolve the issues without needless resort to federal court. The use of administrative procedures would enhance the expertise of those involved and would lessen the demands upon precious judicial resources. Further, an exhaustion rule would serve as an incentive for governmental entities to improve and expand administrative procedural remedies.

Third, initial resort to fair administrative remedies will allow the op-

portunity for quicker and less costly resolution of personnel grievances. The number of cases on the federal dockets continues to grow thereby causing an ever increasing delay in consideration of each case.[3] Most governmental bodies have the resources to offer timely disposition of employee grievances. Moreover, an employee can often avoid substantial attorneys fees and court costs by initially pursuing available administrative remedies.

Fourth, the basic principles of federalism and comity require exhaustion prior to initiation of federal litigation. (Again, in the interest of brevity, Amici herein adopt the argument in the Brief of Amici States in this regard, Section I).

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[3] For example, West Publishing Company's annotations to § 1983 grew from 253 pages in 1970 to well over 1000 in 1981. The number of civil rights cases filed in federal court increased from 296 in 1961 to over 13,000 in 1979, excluding suits by jail inmates. (In 1980, over 12,500 prisoner civil rights suits were pending, compared to only 218 in 1966.)

In the words of Judge Roney,

> "the citizens of the State have a constitutionally based interest in autonomously running the state business and government to the fullest extent possible, until it collides with the federal constitution. The constitutional collision should come, if at all, at the end of state action, not at the beginning." Patsy, supra, p. 912.

It is submitted that this same argument applies equally when local governmental entities and their employees are involved.

CONCLUSION

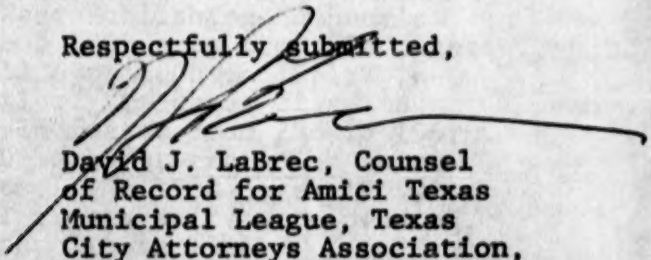
The recent Monell and Owen decisions by this Court have indicated that the purpose of 42 U.S.C. § 1983 is to insure that actions taken by local governmental entities comply with constitutional mandates. When the consitutional rights of their employees are involved, it would simply be unfair to hold municipalities liable as "persons" under § 1983 for alleged injury to employees who refuse to avail themselves of rea-

sonable administrative remedies afforded them.

Moreover, the application of a flexible exhaustion doctrine in § 1983 public employment cases will benefit governmental entities, their employees and the federal courts alike without jeopardizing constitutional rights of the employees. The proper role of the federal courts should be to establish minimum standards with which administrative remedies must conform. Only when no such remedy exists or when the available remedy does not comport with established minimum standards should the federal judicial system, through 42 U.S.C. § 1983, become the initial arbiter of public employee grievances.

This Court should affirm the decision of the Fifth Circuit in this case.

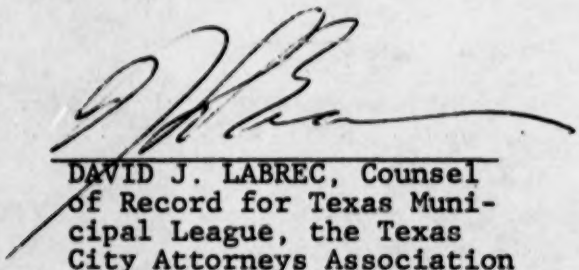
Respectfully submitted,



David J. LaBrec, Counsel of Record for Amici Texas Municipal League, Texas City Attorneys Association, and the City of Huntsville, Texas

PROOF OF SERVICE

I, David J. LaBrec, General Counsel for Texas Municipal League and the Texas City Attorneys Association, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of January, 1982, all parties required to be served have been served with the Brief of Amici Texas Municipal League, Texas City Attorneys Association and City of Huntsville, Texas by mailing copies, postage prepaid, to the counsel listed on the page following:



DAVID J. LABREC, Counsel of Record for Texas Municipal League, the Texas City Attorneys Association and the City of Huntsville, Texas

Office and Post Office Address:

1020 Southwest Tower
Austin, Texas 78701
(512) 478-6601

1. Counsel for Petitioner--

Charles Sims
132 W. 43rd Street
New York, New York 100036

2. Counsel for Respondent--

Jeffrey H. Klink
100 Laura Street
Suite 800
Jacksonville, Florida 32208

3. Counsel for Amici--

National Legal Aid and Defendants Association
Ellen Josephson
1625 K. Street N.W.
Washington, D. C. 20006

National Education and Lawyers Committee for Civil Rights
Micheal Gottesman
1000 Connecticut Avenue N.W.
Washington, D. C. 20036

NAACP Legal, Defense and Education Fund Inc.
Bill Lann Lee
10 Columbus Circle, Suite 2030
New York, New York 10019

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CLERK

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GEORGIA PATSY,

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BOARD OF REGENTS OF THE STATE OF FLORIDA, a Body Corporate, For and On Behalf of, FLORIDA INTERNATIONAL UNIVERSITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, WYOMING, AND TERRITORY OF AMERICAN SAMOA

KENNETH O. EIKENBERRY,
Attorney General,

MALACHY R. MURPHY,
Deputy Attorney General,

THOMAS R. BJORGEN,
Assistant Attorney General,
Attorneys for State of Washington.

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
(206) 753-2552

List of Additional Counsel on Inside and Back Covers

STATE PRINTING PLANT — OLYMPIA, WASHINGTON

AVIATA F. FAALEVAD
Attorney General
P.O. Box 7
Pago Pago, American Samoa
Attorney for Territory of American Samoa

CHARLES A. GRADDICK
Attorney General
State Administrative Building
Montgomery, Alabama 36130
Attorney for State of Alabama

WILSON L. CONDON
Attorney General
Pouch K—State Capitol
Juneau, Alaska 99811
Attorney for State of Alaska

ROBERT CORBIN
Attorney General
State Capitol
Phoenix, Arizona 85007
Attorney for State of Arizona

MICHAEL J. BOWERS
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Attorney for State of Georgia

TANY S. HONG,
Attorney General
State Capitol
Honolulu, Hawaii 96813
Attorney for State of Hawaii

DAVID H. LEROY
Attorney General
State House
Boise, Idaho 83720
Attorney for State of Idaho

TYRONE C. FAHNER
Attorney General
188 West Randolph St., Suite 2200
Chicago, Illinois 60601
Attorney for State of Illinois

LINLEY E. PEARSON
Attorney General
219 State House
Indianapolis, Indiana 46204
Attorney for State of Indiana

ROBERT T. STEPHAN
Attorney General
2nd Floor, Kansas Judicial Center
Topeka, Kansas 66612
Attorney for State of Kansas

STEVEN L. BESHEAR
Attorney General
State Capitol
Frankfort, Kentucky 40601
Attorney for State of Kentucky

WILLIAM J. GUSTE, JR.
Attorney General
Department of Justice
2-3-4 Loyola Building
New Orleans, Louisiana 70112
Attorney for State of Louisiana

FRANK J. KELLEY
Attorney General
Law Building
Lansing, Michigan 48913
Attorney for State of Michigan

WARREN R. SPANNAUS
Attorney General
102 State Capitol
St. Paul, Minnesota 55155
Attorney for State of Minnesota

WILLIAM A. ALLAIN
Attorney General
Carroll Gartin Justice Building
P.O. Box 220
Jackson, Mississippi 39205
Attorney for State of Mississippi

JOHN D. ASHCROFT
Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Attorney for State of Missouri

MICHAEL T. GREELY
Attorney General
State Capitol
Helena, Montana 59601
Attorney for State of Montana

PAUL L. DOUGLAS
Attorney General
State Capitol
Lincoln, Nebraska 68509
Attorney for State of Nebraska

QUESTION PRESENTED

Is a flexible exhaustion of administrative remedies rule with respect to actions brought under 42 U.S.C. § 1983 appropriate in light of considerations of comity, federalism and sound judicial administration, and consistent with Congressional policy?

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Fla. Administrative Code § 6C8-4.19(4) and (5) (1981). 20

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

No. 80-1874

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, a Body Corporate, For and On Behalf of, FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, WYOMING, AND TERRITORY OF AMERICAN SAMOA

STATEMENT OF INTEREST OF AMICI

Recognizing their responsibility to guard, enforce and protect every right guaranteed by the Constitution, most states have developed detailed and effective administrative procedures to ensure that none of the

myriad decisions taken daily by state officials and agencies will act to deprive citizens of those rights. Some state remedies, admittedly, may be inadequate for this purpose, and responsible state officials would be among the first to concede that such remedies need not be exhausted. At issue here, however, is a rule allowing the total circumvention of the most adequate and effective state remedies in all situations where a deprivation of rights cognizable under 42 U.S.C. § 1983 is merely alleged.

The development of fair and effective administrative remedies is an on-going process demanding a substantial commitment of state resources. More importantly, the development of such remedies is a sign of the health and vitality of a dual system of government, for if the states aggressively protect federal rights, core federal interests will be vindicated without any unnecessary federal intrusion.

Conversely, these interests — of the national government as well as of the states — would be subject to forfeit if the wholesale, indiscriminate circumvention of adequate state administrative remedies sought by petitioner is allowed.

SUMMARY OF ARGUMENT

This Court has not yet decided whether adequate state *administrative* remedies must be exhausted before bringing an action under 42 U.S.C. § 1983. A flexible exhaustion requirement of the type adopted by the Fifth Circuit, below, would help preserve a vital role for the states in a dual system of government, without compromising the protection of federal rights. Such an appropriate flexible exhaustion requirement would be consistent with the purposes of § 1983 and recent decisions of this Court. An uncompromising no-exhaustion rule, on the other hand, would needlessly upset federal equilibrium; it would also be inconsistent with the purposes of § 1983 and would draw the federal courts into deciding suits not ripe for adjudication, thereby intruding into state decisions not yet final, and in some cases not yet even rendered.

ARGUMENT

I. A Flexible Requirement That Adequate Administrative Remedies Be Exhausted Serves the Interests of Federalism Without Compromising The Protection of Federal Rights.

Of all the good ideas lying at the core of our form of government, the notion of federalism, a "sensitivity to the legitimate interests of both State and National Governments," *Younger v. Harris*, 401 U.S. 37, 44, 45 (1971), occupies a position of preeminence. Like many such concepts, however, federalism may come into conflict with other equally good ideas when placed in the crucible of the real world. For instance, the responsibility of the federal courts to act as the ultimate guarantor of federally-protected rights, *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) may, when state action is responsible for a deprivation of those rights, require a penetrating federal intrusion. Even so, this Court has determined that the protection and vindication of federal rights must be accomplished "in ways that will not unduly interfere with the legitimate activities of the State * * *" *Younger, supra*, at 44.

The tension and the challenge inherent here has perhaps nowhere been as evident as in the judicial development of 42 U.S.C. § 1983.[1] Although the very adoption of the statute was the product of a "vast transformation" in the concepts of federalism, see *Mitchum, supra* at 242, it was narrowly construed and infrequently litigated for several decades after its passage. *Note, Limiting Section 1983*, 82 Harv. L. Rev. 1486, 1487 (1969). More recently, however, quite likely in response to the increased

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *"

commitment to the protection of individual federal rights which has characterized the second half of this century, § 1983 has gained increased vitality, see *id.* at 1486-87, until today it is something very close to a general damage remedy available to anyone who alleges that a state or local official has withheld, intentionally or negligently, some federal benefit in violation of any federal statute. *Maine v. Thiboutot*, 448 U.S. 1, (1980); *Cf., Parratt v. Taylor*, ___ U.S. ___, 68 L.Ed.2d 420, 427-428 (1981).

A pendulum with this sort of momentum behind it may easily swing too far. This Court, recognizing the potentially dire impacts the post-*Thiboutot* remedy could visit upon already strained governmental entities (see, *City of Newport v. Fact Concerts, Inc.*, ___ U.S. ___, 69 L.Ed.2d 616, 634 (1981)), has, in a number of very recent cases, indulged in some necessary fine tuning of § 1983. In *City of Newport*, at 635, for example, municipalities were held to be immune from awards of punitive damages under § 1983. Significantly, the Court accompanied its discussion of the effects such an award would have on municipalities with a demonstration that the denial of punitive damages would have little, if any, deleterious effect on the protection of federal rights. *Id.*, at 634. This approach represents a classic use of one of the prime injunctions of federalism, the charge that federal rights are to be protected "in ways that will not unduly interfere with the legitimate activities of the States * * *" (Quoting *Younger, supra* at 44). Other recent examples of tailoring § 1983 by carefully limiting its scope are *Middlesex County Sewerage Authority v. National Sea Clammers*, ___ U.S. ___, 69 L.Ed.2d 435 (1981) and *Pennhurst State School and Hospital v. Halderman*, ___ U.S. ___, 67 L.Ed.2d 694 (1981).

With the instant case, the Court is presented with another opportunity carefully to fine-tune § 1983 in a fashion which will avoid some potentially extreme federal intrusions into legitimate state provinces, without compromising in the least the vindication of federally-protected rights.

The petitioner would have the Court hold that under no circumstances is a § 1983 plaintiff required to exhaust even readily available, adequate and appropriate state administrative remedies. The violence which such a rule would do to settled notions of federal-state comity is both immediate and severe. It would allow and even encourage the circumvention of considered state administrative procedures designed to reach a just settlement of the dispute. It would ignore this Court's pronouncement that state forums have the solemn responsibility, equally with the federal courts, "to guard, enforce and protect every right granted or secured by the constitution. * * *" See, *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974). It would ignore this Court's recent recognition that "consideration of federal-state comity" may militate strongly against weakening an exhaustion requirement, even where there has been a "clear violation" of a federal right. *Duckworth v. Serrano*, ___ U.S. ___, 50 U.S.L.W. 3297 (10/19/81). It would remove from the states an incentive to provide full and fair administrative remedies, *Cf.*, Discussion of 42 U.S.C. 1997, *infra* at page 12. And, it would deny the states opportunities to apply the often expensive and hard-won expertise of its administrative agencies in the resolution of disputes.

Perhaps the plainest statement, though, of the important role an exhaustion requirement can play in our federal system was that made in *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973), as follows:

> "The rule of exhaustion in federal habeas corpus actions is rooted in consideration of federal-state comity. That principle * * * has as much relevance in areas of particular state administrative concern as it does when state judicial action is being attacked * * * [Considerations of comity] are not limited to challenges to the validity of state court convictions * * *"

These considerations obtain with equal force in § 1983 actions.

In pronounced contrast to the mischief a no-exhaustion rule could inflict a requirement that a § 1983

plaintiff first exhaust adequate administrative remedies would not impair the right to vindicate federal rights in a federal forum. In the first place, immediate federal adjudication is not necessary to provide immediate protection for federal rights. Comment, *Exhaustion in Section 1983 Cases*, 41 U. Chi. L. Rev. 537, 548 (1974). This is especially true where, as here, interim relief is not even practical — for a court most certainly would not have ordered the petitioner temporarily employed in the positions she sought pending the outcome of the litigation. In addition, a litigant's right to a full and complete proceeding in a federal forum would not be affected by a flexible exhaustion requirement, since state administrative determinations have no *res judicata* or collateral estoppel effect over a federal court. *Id.* at 551.

II. This Court Has Not Squarely Decided That Exhaustion of Administrative Remedies May Never Be a Prerequisite To a § 1983 Action.

The Petitioner's argument that exhaustion of administrative remedies is never required in § 1983 cases leans heavily upon a series of decisions by this Court beginning with *Monroe v. Pape*, 365 U.S. 167 (1961). Although some of these decisions do contain *apparently* categorical dicta that exhaustion of administrative remedies is not required under § 1983, a more exacting analysis shows that, if anything, these decisions actually support the flexible exhaustion requirement adopted below by the Fifth Circuit.

The cornerstone of the later decisions, the authority upon which they will build, is the statement in *Monroe*, *supra* at 183, that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is involved." See, for example, *McNeese v. Board of Education*, 373 U.S. 668, 671, 672 (1963); *Damico v. California*, 389 U.S. 416, 417 (1967); and *Houghton v. Shafer*, 392 U.S. 639, 640 (1968). The initial problem with using this language from *Monroe* as the

source of a rule that exhaustion of administrative remedies is not necessary is that *Monroe*, quite simply, did not deal with *administrative* remedies. Rather, the case dealt with state *judicial* remedies. Note, 51 Miss.L.J. 283, 288 (1980); and Comment, 41 U. Chi. L. Rev., *supra* at 542. Other than simply citing *Monroe* (or citing other cases citing *Monroe*), *McNeese* and its progeny do not give full analysis to their dicta that the exhaustion of administrative remedies is not a prerequisite to § 1983 claims. See, 82 Harv. L. Rev., *supra* at 1491. Key decisions in the *McNeese* line were made through short, per curiam opinions without the benefit of briefing or oral argument. See, *Damico, supra* at 420 (Harlan, J., dissenting) and *Wilwording v. Swenson*, 404 U.S. 249, 252-53 (1971) (Burger, J., dissenting). Yet petitioner would extract from such a basis a rule that exhaustion of *administrative* remedies, no matter how adequate or appropriate those remedies might be, is never necessary. In so doing, Petitioner would ascribe to the court an analysis which, amici states submit, it has never engaged in.

An even more fundamental flaw in basing a no-exhaustion rule on the statements in *Monroe* relied upon by *McNeese* and its offspring is that those statements were made in response to a question wholly apart from that of exhaustion. One of the central issues in *Monroe* was whether actions of governmental officials which were an abuse of their authority nevertheless could be said to be taken under color of state law. See, *Monroe, supra* at 172.

The Court paraphrased the argument that such acts were not under color of state law in the following manner:

> "In this case it is said that these policemen, in breaking into petitioner's apartment, violated the constitution and laws of Illinois. It is pointed out that under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioner that full redress * * *" (*Id.* at 172)

This statement strongly suggests that the issue of adequate state remedies did not arise in *Monroe*, as part of

an argument that the case should be dismissed because the plaintiffs did not avail themselves of those remedies; but rather, as an essential part of the state's position that since the defendants' acts were punishable by state law, those acts could not be under color of state law. See, 82 Harv. L. Rev., *supra* at 1489. Furthermore, the statement in *Monroe* that the federal remedy is supplementary to the state remedy comes immediately after a long discussion of the legislative history of § 1983, *as it relates to the color of law issue, Id.* at 183, and immediately before a discussion of the implications of *U.S. v. Classic*, 313 U.S. 299 (1941) and *Screws v. United States*, 325 U.S. 91 (1945) on that same issue. *Monroe, supra* at 183-187. The statements in *Monroe* relied upon by the *McNeese* line of cases, lying at the foundation of the various dicta relied upon by Petitioner, are thus most appropriately read as meaning simply that in determining whether or not the defendant acted under color of state law it is irrelevant whether state law provides a remedy for the defendant's actions. These statements, when read, as they must be, in the context of the issues to which they were directed, provide no support for the notion that *Monroe* upset the then well-established rule that exhaustion of *administrative* remedies is required in § 1983 cases. See, *e.g., Lane v. Wilson*, 307 U.S. 268, 274 (1939); and 41 U. Chi. L. Rev., *supra* at 542.

Each case in the *McNeese* line containing dicta that exhaustion of administrative remedies is not required rest, ultimately, on this language from *Monroe*. See, *McNeese, supra* at 672; *Damico, supra* at 417; *Houghton, supra* at 640; *King v. Smith*, 392 U.S. 309, 312, n. 4 (1968); *Wilwording, supra* at 251; *Preiser, supra* at 477; *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Allee v. Medrano*, 416 U.S. 802, 814 (1974); and *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975). Each of these cases, furthermore, involved either a situation where traditional exhaustion doctrine would not have required recourse to state administrative remedies, or a situation where judicial, not administrative, remedies were involved. See Note, Developments—Section 1983, 90 Harv. L. Rev., *supra* at 1133, n. 1 (1977); and Comment, 41 U. Chi. L. Rev., *supra* at 543.

For instance, *McNeese* concerned an administrative remedy so inadequate that the Court stated: "When federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." *McNeese, supra* at 676. Accord, *Damico, supra* at 418 and 419 (Harlan, J., dissenting). *Damico, Houghton* and *Carter*, on the other hand, involved situations where recourse to the available administrative remedies would likely have been futile. See, *Damico, supra* at 416, *Houghton, supra* at 640 and *Carter, supra* at 671. The administrative remedy available in *King* was both inadequate, *Patsy v. Florida International University*, 634 F.2d 900, 907 (5th Cir., 1981) and futile. In *Ellis* the only state remedy available to the § 1983 plaintiffs was a judicial one (see *Ellis, supra* at 419), while in *Allee, supra*, no suggestion was made that any administrative remedies even existed. At any rate, the extent of the official intimidation and misconduct present in *Allee* (see, *supra* at 805-809), insured that the resort by the plaintiff farm workers to any administrative remedy would be a futile act indeed. Finally, the no-exhaustion statements in *Preiser* and *Wilwording* were dicta of the most extreme type since, most certainly in *Preiser, supra* at 500, and most likely in *Wilwording*, see *Preiser, supra* at 503 (Brennan, J., dissenting), the claims at issue could not have been raised under § 1983 in the first place.[2]

These cases form the foundation of petitioner's claim that she was not required to exhaust administrative remedies. Each of these cases relies, in the last analysis, on language in *Monroe v. Pape, supra*, which is not even addressed to the issue of exhaustion. Each of these cases presents a factual situation where employment of

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[2]Petitioner's reliance on the no-exhaustion dictum in *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974), is even more misplaced. That case dealt with the effect of threatened, criminal proceedings *against* the § 1983 plaintiff, *Id.* at 454, and not, as does the doctrine of exhaustion, with the effect of civil, administrative proceedings available *to* the § 1983 plaintiff. At any rate, the spectre of Scylla and Charybdis which animated the *Steffel* Court's reasoning, *Id.* at 462, does not obtain when adequate administrative remedies are available.

traditional exhaustion doctrine would have resulted in plaintiffs not being required to exhaust.

Indeed, some of these cases even contain language suggesting quite plainly that it is the traditional, flexible exhaustion doctrine which is to be applied in § 1983 cases. For example, in *Carter*, the Court carefully couched its no-exhaustion holding in these words.

> "Damico, an indistinguishable case, likewise establishes that exhaustion is not required *in circumstances such as those presented here.*" *Carter, supra* at 671 (emphasis supplied).

In *McNeese*, the Court summarized its conclusion by stating that:

> "* * * [w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." *McNeese, supra* at 676.

Damico stressed that to require exhaustion of administrative remedies *in that situation* "would be to demand a futile act." *Damico, supra* at 640.

These cases thus actually lend support to our submission that the flexible exhaustion approach adopted by the Fifth Circuit below is to be used in § 1983 cases. They do not establish that exhaustion is never required in § 1983 cases.

III. The Requirement That Adequate Administrative Remedies Be Exhausted Is Consistent With The Purposes Of § 1983 And Recent Decisions Of This Court.

The pressing reasons of policy for adopting a flexible exhaustion requirement in § 1983 cases are well summarized below, *Patsy, supra* at 910-912, and at 90 Harv. L. Rev., *supra* at 1256-60, 1272 and need not be repeated here. We here propose, moreover, that a flexible exhaustion requirement is also consistent with the *purposes* of § 1983 as well.

In *Monroe*, the Court summarized Congress' intent as: (1) to override certain kinds of state law, (2) to provide

a remedy when the state remedy is inadequate and (3) to provide a remedy where the state remedy, although adequate in theory, is not available in practice. *Monroe, supra* at 173-74. If, aside from cases of actually overriding state law, the purpose of § 1983 is to provide a federal remedy where state remedies are inadequate in theory or practice, it follows that it was the intent of Congress that § 1983 be invoked only *where and when* such state remedies indeed are inadequate. See, 41 U. Chi. L. Rev., *supra* at 553. To apply petitioner's uncompromising no-exhaustion rule would be to ignore this Congressional intent, for if adequate administrative remedies may be bypassed, the federal courts will find themselves in the business of granting first relief under § 1983 when equivalent relief could have been obtained through state processes.[3] Accord, 82 Harv. L. Rev., *supra* at 1490.

Congressional debate on § 1983 "provides only weak support for [§ 1983 as] a supplementary federal remedy * * *" 82 Harv. L. Rev., *supra* at 1492. On the other hand, the evils against which § 1983 was directed "substantiate the three main aims listed in *Monroe* without suggesting that a need was felt for a fully supplementary federal remedy." *Id.* at 1492. Indeed, the second and third purposes of § 1983 as set forth in *Monroe, supra* require application at least of a flexible exhaustion of state administrative remedies requirement for their fulfillment. 41 U. Chi. L. Rev., *supra* at 553.

This reasoning, however, need not also require the ex-

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[3]In fact, the no-exhaustion rule urged by Petitioner would — in stark disregard of Congressional intent — build into § 1983 an *incentive* to bypass adequate state administrative remedies in order to take further advantage of the liberal attorney's fee provisions of 42 U.S.C. 1988; see, *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980), (Powell, J., dissenting). Indeed, all too often, amici suggest, if the incentive of a no-exhaustion requirement is provided, the choice will be made in favor of attorney's fees, and thus the federal court, and state administrative redress will be virtually foreclosed. Who will pay those attorneys' fees when such plaintiffs "prevail," under the extremely liberal construction of that term applicable in these cases? The very states which were afforded no opportunity to correct any alleged wrong through their administrative processes.

haustion of state *judicial* remedies. The three central purposes of § 1983 set forth in *Monroe* all underline the importance of providing a federal remedy for deprivation of federal rights. To require a § 1983 plaintiff first to attempt to vindicate his rights through the state courts would be to condition access to the federal courts on submission to a lengthy process nearly identical in form to the federal court proceeding. An adequate *administrative* proceeding, on the other hand, offers a method of dispute resolution which courts often cannot match. Administrative decision-makers usually have extensive expertise both in the subject matter of the dispute and in construing their own statutes and regulations. They usually have the ability to generate a detailed factual record. 90 Harv. L. Rev., *supra* at 1265-66. Requiring the exhaustion of adequate administrative remedies thus seems to strike the balance truest both to the intent of Congress that § 1983 not supplant adequate state remedies and the imperative that access to the federal courts not be excessively burdened. In this manner the flexible exhaustion requirement we here urge is most faithful to the purposes of § 1983.[4]

The recent decisions of this Court, contrary to the suggestions of Petitioner and the Amici supporting her position, are not inconsistent with this submission.

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[4]The passage of 42 U.S.C. 1997e is consistent with this Congressional intent. That statute directs a court sitting in a § 1983 case brought by an adult prisoner to continue the matter for no more than 90 days to require the exhaustion of any state administrative remedies certified by the Attorney General or determined by the Court to be in compliance with minimum standards promulgated by the Attorney General. Given the felt need by Congress to ensure the full enforcement of the federal rights of persons in institutions, S. Rep. (Jud. Comm.) No. 90-416, 11-15-79, page 2; 1980 U.S.C.C.A.N. 789, and to *encourage* better administrative grievance resolution systems, *Id.* at 1980 U.S.C.C.A.N. 816, this statute is most properly viewed as a relaxation of existing exhaustion requirements with an incentive to the states to bring their administrative procedures into line with the Attorney General's standards. (The statements of Congressman Butler, to the contrary, cited in Petitioner's Brief at page 52 are simply in error.) To read the statute as instead imposing an exhaustion requirement where one was lacking in the past is to ignore the Congressional intent more fully to protect the federal rights of institutionalized persons and to improve state administrative procedures.

In *Gibson v. Berryhill*, 411 U.S. 564, 574-75 (1973), after stating the inflexible no-exhaustion rule and citing *McNeese* and *Damico*, the Court added:

> "Whether this is invariably the case * * * is a question we need not now decide; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy, *an issue which under federal law the District Court was required to decide*, was for all practical purposes identical with the merits of appellees' lawsuit." (Emphasis supplied)

Significantly, the Court expanded upon this statement by adding:

> "State administrative remedies have been deemed inadequate by federal courts and hence not subject to the exhaustion requirement, on a variety of grounds. Most often this has been because of delay by the agency, Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 46 S.Ct. 408, 70 L.Ed. 747 (1926), or because of some doubt as to whether the agency was empowered to grant effective relief, Union Pac. R. Co. v. Board of Comm'rs of Weld County, 247 U.S. 282, 38 S.Ct. 510, 62 L.Ed. 1110 (1918); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963). State administrative remedies have also been held inadequate, however, where the state administrative body was found to be biased or to have predetermined the issue before it. Kelly v. Board of Education, 159 F.Supp. 272 (MD Tenn. 1958)." (*Id.* at 575, n. 14.)

With this observation the Court made plain that it did not consider *McNeese* and its descendants as establishing the rigid no-exhaustion rule here urged by petitioners. Indeed, *Berryhill* leaves quite unmistakable the Court's observance of a flexible rule requiring the exhaustion of adequate state administrative remedies. See, *Id.* at 581 (Marshall, J., dissenting).

The Court applied a flexible exhaustion rule again in *Barry v. Barchi*, 443 U.S. 55 (1979). After rejecting the ar-

gument that the Plaintiff there must have exhausted state administrative remedies, the Court stated the rule of decision as follows:

> "Under existing authority, exhaustion of administrative remedies is not required when the question of the adequacy of the administrative remedy * * * [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit." (*Id.* at 63 n. 10, citing *Gibson* at 575).

The four dissenters agreed that "the District Court properly declined * * * to require exhaustion of state remedies that were themselves being challenged as unconstitutional." *Id.* at 68-69 (Brennan, J., dissenting). The dissenters also expressly joined in that part of the majority opinion holding that exhaustion was not necessary in that case, *Id.* at 74, thus putting the weight of a unanimous court behind an apparent use of the flexible exhaustion requirement petitioner would now have the Court reject.

An even more striking fortification of an exhaustion requirement came in *Huffman v. Pursue,* 420 U.S. 592 (1975). A state nuisance judgment against the § 1983 plaintiff had become final and, as the Court apparently was ready to assume, the time for appealing it had run. *Id.* at 608. Even though there was no proceeding, civil or criminal, pending against the plaintiff, the Court applied the *Younger* doctrine and held that he "must exhaust his state appellate remedies before seeking relief in the District Court unless he can bring himself within one of the exceptions specified in *Younger.*" *Id.* at 608. This Court thus found the dictates of federalism so strong, *Id.* at 601, that it required the § 1983 plaintiff, unless he could meet the difficult *Younger* showing, to exhaust state judicial remedies even though there was no action pending against him and even though exhaustion was then impossible, since the time for appeal was assumed to have lapsed. *Id.* at 608.

The Court, in effect, imposed a requirement that a § 1983 plaintiff must have exhausted his state appellate remedies if he wishes to challenge the application against

him of some state law under which a legal proceeding was once pending against him. If considerations of federalism require exhaustion of appellate remedies in a *Huffman* setting, surely they require the much less onerous and much more potentially helpful exhaustion of administrative remedies in cases where the § 1983 plaintiff has not been a defendant in state court. See, Section I, *supra*.

Petitioner, and the Amici supporting her, attach great weight to the most recent of this Court's opinions in this area. See, Petitioner's Brief, page 21; Brief for National Education Association and Lawyer's Committee for Civil Rights Under Law as Amici Curiae, pp. 7 and 8; Brief for the Amicus Curiae National Legal Aid and Defender Association, page 13. Those cases do not, however, provide the mileage which they attempt to squeeze out of them.

In *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Delaware State College v. Ricks*, ___ U.S. ___, 66 L.Ed.2d 431 (1980); and *Chardon v. Fernandez*, 50 U.S.L.W. 3341 (November 2, 1981) the Court held that state statutes of limitations and state tolling rules apply in the context of § 1983 actions. Those holdings were, of course, required by the explicit provisions of 42 U.S.C. § 1988 because such state law, very simply, is not "inconsistent with the constitution and laws of the United States."[5]

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[5]Section 1988, in pertinent part, provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statues of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. * * *"

By the same reasoning, however, we submit that in § 1988 Congress also required the application of state law with respect to the exhaustion of administrative remedies, unless such laws, again, are "inconsistent with the constitution and laws of the United States." But, there is nothing whatsoever inconsistent with the constitution and laws of the United States in applying state rules with respect to the exhaustion of administrative remedies in a flexible manner, and no credible suggestion to the contrary has or can be made to this Court. Absent such a showing of inconsistency, made clearly and forcefully, it therefore should be concluded that Congress has likewise required federal court deference to state law in this area, just as in other areas such as the application of state statutes of limitation.

Harmonizing the statute of limitations rules announced in *Tamonio, Ricks,* and *Chardon,* with the flexible exhaustion rule which Amici states here urge is quite simple. Such a rule, we suggest, would provide that if a state, by application of its own law, would require exhaustion of administrative remedies, then such exhaustion is also indeed a precedent to a § 1983 action, — unless the application of both state limitation of actions law and state exhaustion of administrative remedies rules would oust the federal court of jurisdiction and thus preclude an injured party from access to the federal court to seek redress for a federally-protected injury. In that case the responsibility, authority, and jurisdiction of the federal courts to provide the necessary protection for federally-guaranteed rights is paramount and must prevail.

This Court need not now decide, we submit, whether under those circumstances a state statute of limitations, or a state exhaustion of administrative remedies rule, should fall. That decision can, consistent with constitutional doctrine and sound principles of judicial administration, be left to the district courts and courts of appeal to be determined on the basis of the particular facts and circum-

stances presented to them in any individual case.[6] The point simply is this: The federal penetrating intrusion should be required by this Court only where necessary to pierce a state law wall existing between an aggrieved individual and the door to the federal courthouse. Where such penetration is not absolutely necessary, sound principles of comity, federalism, and wise judicial administration militate strongly in favor of deference to state law and the application of a flexible exhaustion of administrative remedies rule, where those remedies are available, adequate, and would not work automatically to deny any potential plaintiff access to the federal court.

Petitioner, and her supporting Amici, also place great store in this Court's most recent decision in *Fair Assessment In Real Estate Association, Inc. v. McNary*, 50 U.S.L.W. 4017 (December 1, 1981). The analysis and reasoning employed in the *Fair* case should, however, we submit, support the application of a flexible exhaustion rule which would not under all circumstances result in a complete bar to federal court jurisdiction under 42 U.S.C. 1983. The principles of comity and sound judicial administration embodied in the majority opinion are not unique in their application to actions involving the assessment and collection of state taxes, and should not be cavalierly rejected in the context of other § 1983 actions, as Petitioner's and her supporting amici would have this Court do.

The four concurring justices in *Fair*, while not willing to accede to an absolute bar to § 1983 actions under the circumstances, did recognize, at least in the area of state

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[6]In some cases the denial of civil rights is alleged entirely independent of the administrative process. In others, it is, and will continue to be, alleged that the administrative process itself somehow infringed upon federally-protected rights, or that rights were denied by or during the review granted, because of faulty procedures, lack of due process, bias, etc. Given adequate flexibility and guidance, the district courts and courts of appeal are perfectly capable of determining which state rule should be overridden, if any, under the particular circumstances, subject always to this Court's supervisory appellate jurisdiction.

taxation, a necessity for the ability of states to permit their well-established administrative processes to run their course. While prefacing his remarks with a restatement of what he perceives to be an absolute no exhaustion rule, Justice Brennan also recognized that such a conclusion "rests firmly on the understanding that such was the intention of Congress in enacting § 1983." (50 U.S.L.W. 4027, Brennan, J., concurring) We, of course, here submit that Congress, in enacting § 1988, also intended, indeed directed, that state administrative remedies be exhausted, where appropriate, and where they would not act to preclude federal court jurisdiction. See, page 16, *supra*. As Justice Brennan went on to say:

> "My view has always been that displacement of section 1983 remedies, can only 'be justified by a clear statement of Congressional intent, or, at the very least, by the presence of the most persuasive considerations of policy.' Surely a somewhat lesser showing is required where, as here, we are concerned not with the displacement of the section 1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state administrative process. Where the obligation to require exhaustion of administrative remedies may be fairly understood from Congressional action, *or is in accord with Congressional policy*, not only is section 1983 no bar, but the federal court should be alert to further those policies." (footnote omitted, citation omitted) (Emphasis supplied) (50 U.S.L.W. 4027, Brennan, J., concurring)

It is essential to keep in mind that virtually all § 1983 actions seek damages because of the actions or behavior of individual state or local officials, acting in their official capacities. In many, if not most, of these cases some or all of the named defendants have had only a passive involvement in the action complained of. They are, for example, agency directors, governors, or other executive or administrative officers having supervisory authority over someone who has made a decision which is alleged to constitute a denial of some individual's civil rights. In many of these cases, the first time the Governor of a state, or a

state agency director even hears of the problem is when a complaint is served upon them. It is simply not fair to require these individuals, under those circumstances, to respond in damages for doing something wrong when they have not even been given the opportunity to do something in the first place. That something, of course, is most often provided to them through access, by the complaining individual, to available and appropriate state administrative processes.

Likewise, this Court cannot ignore the fact, the legal reality and the political and governmental necessity, that states, as well as municipalities, are directly involved in these actions. The damages, if any, are to be paid from governmental treasuries as a matter of state and local law.[7] This Court should not any longer be caught up in the traditional fiction that because states are immune from suit in this area, only individuals are being sued and thus are to pay the damages, and that state funds are not involved. To continue that fiction in this context is, irresponsibly, to ignore reality. Because the states' treasuries are being placed at risk, the states should be allowed the opportunity to repair, through their administrative processes, any damage occasioned by the actions of an individual — before the public treasury is required by a federal court, a different and higher governmental body, to pay damages which may have been avoided or repaired if their full governmental and administrative process had been allowed to run its course. Principles of comity, federalism, sound judicial administration, basic fairness and common sense demand no less. Again, as Justice Brennan also said in *Fair, supra,*

> "* * * Many of the officials named as defendants have no small involvement in the administrative process. It surely seems appropriate that before being held accountable in court those officials have the opportunity fully to consider petitioners' claims within the administrative forum that provides the only basis

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[7]See, e.g., Chap. 4.92 Rev. Code Wash., particularly RCW 4.92.060, 070, 170.

for their involvement in this matter. * * *" (citation omitted) (50 U.S.L.W. 4027, note 24, Brennan, J., concurring)

IV. Until Petitioner Here Exhausts State Administrative Remedies, She Has Not Been Deprived of Any Right Under Color of State Law.

The § 1983 defendant in this case is a "body corporate" and an arm of the state Department of Education. Fla. Stat. 240.205 and § 20.15 (West 1977). The Petitioner does not contend that any individual employees or officials of the defendant deprived her of any right. Rather, she insists that it was the defendant body itself which deprived her of these rights.

It is the official and express policy of the defendant that it will not discriminate on the basis of race or sex in its employment practices, *Patsy, supra* at 913. The initial determination as to whether a job applicant will be hired involves decision-making on several different levels in the University structure. See, Fla. Ad. Code § 6C8-4.19(4) and (5) (1981). In part as a method of ensuring that discrimination on the basis of race or sex will not creep into the initial hiring decisions, see *Patsy, supra* at 913, there was established within the University itself a comprehensive procedure for appeal from initial employment decisions. *Id.* at 913. The University obviously takes its nondiscrimination policy seriously and, through its grievance procedure, has gone to great lengths to effectuate that policy. The initial hiring decision and the grievance procedure are parts of a coherent, unified process aimed at ensuring that the University hiring decisions are not discriminatory.

After going through virtually none of this process, Petitioner now claims that a hiring decision by the defendant discriminated against her. Petitioner claims that she can ignore fully all of the procedures afforded her by defendant to protect her against inadvertent discriminaiton and still contend that the defendant body *itself* deprived her of a right not to be discriminated

against. Fortunately, such a claim is not cognizable under § 1983.

For, as this Court observed in *Monell v. Department of Social and Health Services*, 436 U.S. 658, 690 (1978),

> "* * * the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights * * *"

The *Monell* Court, *supra* at 690-91, also recognized that deprivations pursuant to governmental "custom," although lacking formal, official approval, are also cognizable under § 1983. The actions of the University in this case fail on both counts to rise to the level of § 1983 deprivations. The official policy of the University prohibits discrimination, and the comprehensive grievance procedure designed to effectuate that policy indicate that employment discrimination would be anything but customary. The requirement that a govermental body be responsible through plan, policy or custom for a deprivation of rights before it may be held liable for that deprivation is one born of simple notion of fairness. The requirement is not met by the failure of the initial selection process of defendant to give Petitioner the employment she wanted.

V. Petitioner's Claim Under § 1983 Is Not Ripe For Adjudication.

Although collateral in nature, Petitioner's resort to federal court was an attempt to invoke federal judicial review of a *tentative* state administrative decision. To prevent courts from entangling themselves in abstract disagreements over administrative policy and to protect agencies from judicial interference until the administrative decision is finalized, this Court has developed the "ripeness" limitation on judicial review of administrative decisions. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Under this doctrine, a court is to consider the fitness of the issues for judicial determination and the hardship to the parties in delaying court consideration in

determining whether an issue is ready for judicial resolution. *Id.* at 149. Since the risks of entanglement and interference to which the ripeness doctrine is addressed are present, if anything, to a greater degree in a federal court challenge (under § 1983) to a not yet final state administrative determination, the ripeness doctrine should be applied in these cases as well. Under that doctrine, recent cases make clear, Petitioner's claim is simply not ripe.

In *Federal Trade Commission v. Standard Oil of California*, ___ U.S. ___, 66 L.Ed.2d 416 (1980) the Court concluded that a challenge to the initiation of an F.T.C. administrative proceeding was not ripe for review, even though the initiation of the proceeding itself was alleged to be unlawful. Although the administrative action challenged here admittedly had progressed beyond the point of initiation of a proceeding, the considerations which led this Court to remand for dismissal on ripeness grounds in the F.T.C. case speak strongly for a similar result here. The Court observed that the administrative complaint before the F.T.C. was not a definitive statement of position. *Id.* at 425. Any discrimination suffered by Petitioner below likewise could not have been the result of a "definitive statement of position" by defendant, since defendant had a strong policy not to discriminate. The Court noted that the initial administrative decision could be appealed within the F.T.C. *Id.* at 425. The acts complained of by Petitioner also could be appealed within the agency. The Court noted that the burden on defendant caused by delaying adjudication was merely having to respond to the administrative complaint. *Id.* at 425-26. Similarly, the only "burden" on Petitioner here, should exhaustion be required, would be going through the administrative process. Finally, the Court found that immediate adjudication would interfere with the proper functioning of the agency in that it would deny the agency the opportunity to correct its own mistakes and to apply its expertise to the dispute, and would lead to piecemeal review. *Id.* at 426. Each of these risks would be present be-

low if Petitioner is allowed to circumvent administrative procedures. Since the very dangers the ripeness doctrine guards against would be present should Petitioner be allowed to bypass administrative remedies, it follows that her claim is not ripe for review until she exhausts those remedies.

The question of ripeness does not arise only in the context of review of administrative decision. In *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978), this Court decided that the constitutionality of a Congressional limitation of liability for nuclear accidents was ripe for adjudication. In discussing the prudential considerations inherent in the doctrine, the Court noted that a delay in adjudication would not aid the Court in resolving the issue, that it would foreclose relief and that a delay would frustrate Congressional intent.

Requiring exhaustion here, and in similar future circumstances, will, however, have exactly the opposite effect. A delay in Petitioner's § 1983 suit for exhaustion purposes would aid the District Court in resolving the issues because it would sharpen those issues, provide a golden opportunity for informal settlement, allow defendant to exercise its full procedures for the purpose of effectuating its non-discrimination policy, and generate a detailed record, an important feature in constitutional adjudication. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 146 (1974). A delay for exhaustion purposes also would not foreclose any relief, see page 6, *supra* and would tend to *serve* the purposes of § 1983. See, pages 10-12, *supra*. The tests used in *Duke Power* indicate that the Court will be in a "better position later," *Duke Power, supra* at 82, to resolve this dispute. With that, the ripeness doctrine counsels that Petitioner and others like her be required to exhaust her administrative remedies, where they are available, and adequate, and this application would not time bar federal court jurisdiction.

CONCLUSION

The exhaustion issue thus presents one of the less perplexing parts of the riddle of how to ensure the vigorous protection of federal rights without upsetting the essential equilibrium between the national and state governments. A flexible exhaustion requirement of the type adopted below will serve well our federalism and, if anything, will facilitate the vindication of federal rights. An unyielding no-exhaustion requirement, on the other hand, will unduly tax those balances, without significantly promoting the vindication of federal rights.

Respectfully submitted,

KENNETH O. EIKENBERRY,
Attorney General,

MALACHY R. MURPHY,
Deputy Attorney General,
COUNSEL OF RECORD

THOMAS R. BJORGEN,
Assistant Attorney General

Attorneys for Amicus
State of Washington

Temple of Justice
Olympia, Washington 98504
(206) 753-2552

[Additional list of Counsel on Inside and Back Covers]

RICHARD H. BRYAN
Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
Attorney for State of Nevada

GREGORY H. SMITH
Attorney General
208 State House Annex
Concord, New Hampshire 03301
Attorney for State of New Hampshire

JAMES R. ZAZZALI
Attorney General
Department of Law and Public Safety
State House Annex
Trenton, New Jersey 08625
Attorney for State of New Jersey

RUFUS L. EDMISTEN
Attorney General
Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Attorney for State of North Carolina

ROBERT O. WEFALD
Attorney General
State Capitol
Bismarck, North Dakota 58505
Attorney for State of North Dakota

WILLIAM J. BROWN
Attorney General
State Office Tower, 30 E. Broad St.
Columbus, Ohio 43215
Attorney for State of Ohio

LEROY S. ZIMMERMAN
Attorney General
1641 Strawberry Square
Harrisburg, Pennsylvania 17120
Attorney for State of Pennsylvania

DENNIS J. ROBERTS II
Attorney General
72 Pine Street
Providence, Rhode Island 02903
Attorney for State of Rhode Island

DANIEL R. MCLEOD
Attorney General
Wade Hampton Office Building
Columbia, South Carolina 29211
Attorney for State of South Carolina

MARK WHITE
Attorney General
Capitol Station, P.O. Box 12548
Austin, Texas 78711
Attorney for State of Texas

DAVID L. WILKINSON
Attorney General
State Capitol
Salt Lake City, Utah 84114
Attorney for State of Utah

JOHN J. EASTON, JR.
Attorney General
101 State Street
Montpelier, Vermont 05602
Attorney for State of Vermont

CHAUNCEY H. BROWNING, JR.
Attorney General
State Capitol
Charleston, West Virginia 25305
Attorney for State of West Virginia

BRONSON C. LA FOLLETTE
Attorney General
P.O. Box 7857, State Capitol Bldg.
Madison, Wisconsin 53702
Attorney for State of Wisconsin

STEVEN F. FREUDENTHAL
Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
Attorney for State of Wyoming